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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES SMITH, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendant was found guilty of rape and a crime against nature. He was sentenced to six years for the crime of rape and a concurrent term of one to six years for the crime against nature. On appeal he contends that he was not proved guilty beyond a reasonable doubt.

The testimony of the prosecuting witness, three times married and the mother of four children, shows that on August 16, 1960, between 12:30 and 1:00 A.M., she was walking on the street a short distance from her home, when she was accosted by defendant with a knife in his hand. He said, "If you scream, I will kill you." They walked into an adjoining alley, and he said, "Take your panties off and lie down." She described in detail acts of sexual intercourse and two acts of deviate sexual conduct after he put the knife at her neck. At one time she grabbed the knife but was too frightened to use it and returned it to defendant. Defendant agreed to take her home, and she suggested they stop for a drink, but as they did not see any tavern open defendant went with her to her basement apartment at 3978 Ellis, passing through a lighted courtway. She invited him into the apartment, where he stayed about ten minutes and at no time displayed his knife.

The trial court questioned the prosecuting witness at

length. She stated she was too frightened to "try to stab him" and did not "yell" or "scream" at any time.

A police officer testified that on August 16, 1960, at approximately 1:40 A.M., he responded to a call at 3978 Ellis. Upon arrival, he entered the vestibule and saw the defendant standing in the lobby. The officer was in uniform and began to question the defendant as to his identity. As they were talking, the prosecuting witness came to the door and said, "That is the man just raped me." As she said this, the defendant pushed the officer against the door and ran into the basement. The officer pursued him, fired a shot in his direction, and eventually found him hiding in the basement. Upon searching the defendant, he found a knife and two rings.

On cross-examination, the officer testified that defendant denied he raped the prosecuting witness and said that he had paid her.

Defendant testified that he met the prosecuting witness in a tavern on Ellis Avenue, and at her solicitation they had sexual intercourse in an alley, for which he paid her $7.00. After leaving the alley with her, she proposed having "another drink," and the tavern was closed. He then found his wallet was missing and threatened her unless she returned it. At her suggestion, he accompanied her to her home, where he remained fifteen or twenty minutes. He again threatened her and started to leave. As he stood in the hallway, the police arrived, and he fled because he was on parole and "not supposed to be on the street that late at night." He denied any acts of deviation or forcing her "at the point of a knife" to have relations with him.

Defendant contends the evidence failed to establish beyond

a reasonable doubt that any act was committed upon the prosecutrix against her will. Defendant asserts there is no evidence of any resistance whatever--"her testimony tends to represent her as a co-operative, helpful participant in the act of sexual intercourse," and that she herself suggested one of the acts of deviation. Defendant states, "Whereas a ravished woman might be expected to flee from her persecutor or take the first opportunity to scream for help, the prosecutrix in the present instance merely expressed the need for a drink and began walking with the defendant in the direction of the nearest tavern."

Defendant's authorities include People v. Rossililli, 24 Ill.2d 341, 181 N.E.2d 114 (1962), where the court said (p. 347):

> "It is also fundamental that voluntary submission by the female, while she has power to resist, no matter how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape."

Also, People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950) (p. 304):

> "It is for this reason that reviewing courts are especially charged with the duty to carefully examine the evidence in rape cases."

Defendant argues that the admitted conduct of the prosecutrix at the time of and the rest of the evening following the alleged crimes was not consistent with or in any manner corroborative of the deeds about which she later complained; that nothing appears in the record regarding the charges other than her bare testimony; and defendant denied at all times the charges made against him.

The State contends that the testimony of the prosecuting witness up until the time of the commission of the act of rape and crime against nature is not unusual. She was accosted on the street, and her life threatened, and at knifepoint she was forced

into an alley. The act of intercourse took place against her will. Defendant was not satisfied and renewed his threats. She complied with his demands, and the crime against nature occurred, after which the second act of intercourse took place.

The State further asserts that "an outcry or attempt to flee on the way home would not have insured Smith's apprehension. It may have brought more physical harm to [the prosecutrix]. If she ran into her apartment and locked the door, as appellate counsel has suggested, it is also unlikely that Smith would have been apprehended. She did deceive him and the police were called. At the first assurance of her safety, the arrival of officer Lockhart, [the prosecuting witness] made an outcry and accused the defendant of rape. The trial judge found the testimony of [the prosecuting witness] to be clear and convincing. He noted that the unusual nature of her testimony dictated against fabrication. Ample corroboration was found in the prompt outcry to officer Lockhart, the defendant's flight and the recovery of the knife from his person. Other than the testimony of the defendant, no evidence was introduced to rebut the presumption of [the prosecuting witness'] chastity. The trial judge considered Smith's testimony implausible. His credibility was impaired by a prior felony conviction."

After a careful examination of this record, we conclude the testimony in the abstract shows that the trial judge was confronted with a rather bizarre situation. The prosecuting witness failed to make an outcry during the acts or on the street after the acts took place, but she did make an immediate outcry to a police officer who was called to her home. Whether her related post-rape conduct was intended to deceive defendant in order to

lure him into a favorable position for arrest, as arrayed against defendant's denials, was a question of credibility of witnesses for the trial court's determination.

We believe this case calls for the application of the rule set forth in a somewhat similar rape case, People v. Henson, 29 Ill.2d 210, 193 N.E.2d 777 (1963), where the Supreme Court said (p. 213):

> "We have repeatedly held that where a case is tried without a jury the determination of the credibility of the witnesses and the weight to be given to their testimony is for the trial judge, and this court will not substitute its judgment on such matters for that of the trial judge, who saw and heard the witnesses."

Therefore, as we cannot say that the evidence is so improbable or unsatisfactory in this case as to require a reversal, we find no reason to disturb the judgment of the trial court.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51551

ROMAIN C. KNOCKAERT, Plaintiff-Appellant,	)	APPEAL FROM THE
vs.	)	CIRCUIT COURT OF
STUDEBAKER CORPORATION, Defendant-Appellee.	)	COOK COUNTY.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In this action, plaintiff, Romain C. Knockaert, whose services as Regional Director for Europe, on behalf of defendant, Studebaker Corporation, was terminated, sued the defendant for damages in the amount of $11,000. The defendant filed a motion for summary judgment on the ground that no factual issues existed. After considering the complaint, the motion and affidavit of defendant's Vice President, plaintiff's counter affidavit and argument of counsel, summary judgment was entered for the defendant. This appeal followed.

It appears from the complaint that the plaintiff had been employed by defendant in various capacities since 1927; that plaintiff was the defendant's Regional Director for Europe since October, 1945, pursuant to a written employment contract; and that about March 1, 1964, the defendant terminated said employment contract which provides in part as follows: "Upon termination of this agreement, Company will pay the customary traveling expenses for the return of Employee and his family to South Bend, Indiana." It was alleged that plaintiff's family consisted of himself, his wife, and two daughters, ages 19 and 11, and that the customary traveling expenses amounted to $11,000 which defendant failed to pay him although frequent demands for payment were made.

In its motion for summary judgment the defendant contended there was no issue of fact entitling the plaintiff to any relief. In support of its motion, the defendant submitted the affidavit of one of its vice presidents who stated, under oath, that at the time the employment of plaintiff was terminated he was a resident of Brussels, Belgium, and he still resides there; that plaintiff never advised the defendant that he incurred any expenses for the return of himself and family to United States; and that plaintiff advised him that he had no intention of returning.

Plaintiff filed a motion to strike the affidavit on the ground that the issue of whether or not plaintiff has returned or intends to return to South Bend are immaterial matters, because he is not required to return, in order to become entitled to payment of the customary traveling expenses, under the employment contract. In support of this motion, plaintiff filed his affidavit setting forth that he still resides in Belgium and has not reached a decision as to when he will return to South Bend with his family, but that it was his intention, understanding, and belief, that under the contract the "payment of travel expenses constituted a benefit to which I was entitled whether or not I and my family returned to South Bend, Indiana."

After hearing argument, the trial court held that under the employment contract the plaintiff was not entitled to traveling expenses unless such expenses are actually incurred by him. A summary judgment was awarded to Studebaker and it was stipulated between the parties that in the event this court reversed the judgment the total damages for traveling expenses will amount to $9,377.22.

Plaintiff contends that "under the terms of the contract in question, upon termination of plaintiff's employment, defendant became obligated to pay plaintiff the customary amount of such traveling expense as termination pay, and that such obligation was not conditioned upon plaintiff's incurring traveling expenses nor to any other condition precedent." He insists he was to be paid upon termination of the contract whether or not he intends to return to the United States.

Paragraph 9 of the contract provides that the contract is to be construed in accordance with the laws of the State of Indiana. In construing any portion of a contract, the contract is to be construed as a whole, giving the words used in a contract their common, ordinary, and natural meaning, unless it is clear that some other meaning was intended. Haworth v. Hubbard, 220 Ind. 611, 44 N.E.2d 967. The parties are in accord with Haworth, but nevertheless have argued conflicting interpretations favorable to their contentions while each insists no ambiguous words appear in the contract. The sole issue appears to be whether the traveling expenses must be incurred by plaintiff as a condition of payment by defendant.

The pertinent part of the contract reads, "Upon termination of this agreement, Company will pay the customary traveling expenses for the return of Employee and his family to South Bend, Indiana." The trial court concluded that the contract between the parties provides for reimbursement of expenses actually incurred. (Emphasis added.) Plaintiff argues that the word "reimburse" does not appear in the contract but instead the word "pay" is what is used in the contract.

Plaintiff refers us to Webster's New International Dictionary,

Second Edition, at page 2100, which defines "reimburse" as follows: "Literally to replace in a purse (an equivalent for that taken, lost, or expended); hence, to pay back; repay." He states that although the word "reimburse" is included in the list of synonyms of the word "pay" the two words are distinguished therein as follows:

> To pay is to discharge one's obligation to another, whether for services rendered or goods delivered;... To reimburse is to make good an expenditure; as, to reimburse one's agent for his expenses;... (Pages 1796-1797)

It is further argued that the court misinterpreted the word "customary traveling expenses" to mean actual traveling expenses. He says "customary" does not mean "actual", rather "customary" means, "Agreeing with, or established by, custom; established by common usage; habitual; as one's customary exercise." (Webster's New International Dictionary, Second Edition, p. 651.) He also stresses that the word "actual" is used nowhere in the contract with respect to traveling expenses. "Furthermore, it is inconsistent to hold that expenses must be 'incurred', i.e., established at some later date, when the contract calls for payment 'upon termination'."

We agree with the plaintiff that the trial court has no power to make a new contract for the parties or by construction to write a new agreement into which the parties have not entered. National Steel Corp. v. L. G. Wasson Coal Mining Corp., 338 F.2d 565. We disagree, however, that the trial court by its finding rewrote the contract. We are in accord with defendant that the critical words in the contract are "traveling expenses." The ordinary meaning of those words is an actual outlay or expenditure of funds for the purpose of travel. Webster's New International

Dictionary, Second Edition, p. 896, defines "expense" as "That which is expended, laid out, or consumed; outlay;..., cost or money paid out;...." Webster's Third New International Dictionary, p. 800, defines the term thus:

> Something that is expended in order to secure a benefit or bring about a result... the charges that are incurred by an employee in connection with the performance of his duties and that typically include transportation, meals, and lodging while traveling...money given to an employee as reimbursement for such charges....

[1] It seems to be plaintiff's interpretation of the agreement that upon termination of the employment contract he should receive traveling expenses regardless of whether he returns to the United States or elects not to return. From the affidavits in the record it is clear that plaintiff does not intend to return at this time and has demanded the equivalent of traveling expenses as severance or termination pay. If the parties had intended to follow such a procedure it would have been simple to provide for it. Manifestly the only agreement was to pay traveling expenses upon severance. We interpret the ordinary, common and usual meaning of the words as an agreement to pay expenses for plaintiff's actual return with his family to this country. To hold otherwise would be to make a contract for the parties different from that which they made for themselves which, as plaintiff correctly states, we may not do. There is no dispute that no such expenses have been incurred or that plaintiff intends to make a return with his family at this time. The pleadings and affidavits show that there is no triable issue of fact and the trial court had no alternative but to grant summary judgment for the defendant.

JUDGMENT AFFIRMED.

MURPHY, P.J., and ADESKO, J., concur.

Abstract only.

No. 50984

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM M. JONES, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a non-jury trial the defendant was found guilty of attempt (robbery) and sentenced to serve from two to ten years in the penitentiary. His defense was that the attempt at robbery was only a prank and not seriously intended.

On appeal he argues that an admission made by him was in reality an oral confession and therefore a list of the witnesses should have been given him and that the trial court should have conducted a preliminary hearing as in cases where a confession is involved. He also contends that the State failed to prove him guilty beyond a reasonable doubt. The facts follow.

On May 25, 1964, at about 8:30 in the morning the defendant entered Cohen's Spotlite Grocery Store. He ordered some pork chops from the butcher and then walked out of the store without picking them up. Several minutes later he returned and asked for his order. The grocer, Henry Gronsky, sent a fellow employee to the back of the store to get the package, at which time the defendant handed a note to Gronsky. It said, "Look, give me all your money, I have a gun." Gronsky testified that defendant held the note with one hand while he kept his other hand in his pocket. Gronsky read the note and asked defendant what he was talking

about, to which the defendant replied, "Give me your money." Gronsky grabbed the defendant and called for assistance from another employee. Defendant attempted to escape, but Gronsky and the other employee caught him and held him for the police.

Defendant was taken to the police station and questioned. Officer Robert Cozzi testified that during the examination "the defendant, Mr. Jones, stated that he was doing this on a dare from an unnamed person. I asked the defendant the name of this unnamed person. He said he didn't know his name. I asked the defendant if he had written that note. He told me he did."

Defendant admitted on the witness stand that he wrote the note and handed it to Gronsky. He insisted that the entire affair was a practical joke; that he had played similar jokes on Gronsky over a period of time; that he had been a steady customer of the store for about four and one-half years and that it should have been apparent to Gronsky that he (defendant) did not have a gun. Gronsky testified that while he had seen the defendant at times in the store, he had had no conversations or business transactions with him.

[/] Defendant now contends that the testimony of Officer Cozzi regarding defendant's admission that he had written the note was, in essence, testimony of an oral confession and therefore he was entitled to a list of the witnesses present at the time it was made. He further contends that a preliminary hearing should have been held, presumably for the purpose of determining whether or not the statement was voluntary. These arguments are devoid of merit.

A confession is a voluntary acknowledgment of guilt after the perpretation of an offense, and it does not embrace mere statements or declarations of independent facts from which

guilt may be inferred, while an admission is any statement or conduct from which guilt does not necessarily follow. People v. Stanton, 16 Ill. 2d 459, 158 N.E.2d 47. The State is not required to furnish a list of witnesses present at the time of an admission, but it appears that such a list was furnished to the defendant.

The testimony of Officer Cozzi was corroborated by the testimony of the defendant, and it is inconceivable that the defendant could have been prejudiced by the admission or the policeman's testimony.

We proceed to the final point, that the evidence was insufficient to support the conviction. The trial court heard the testimony of the witnesses and judged their credibility. At the close of his direct examination the defendant said, "I don't think it's a funny joke now." The trial court concluded it was not and the evidence supports his finding beyond any reasonable doubt. The judgment is affirmed.

JUDGMENT AFFIRMED

Sullivan, P.J. and Dempsey, J. concur.

abstract only.

50527

EDWARD J. DAMER, Plaintiff-Appellant, vs. BURTON BROWNE and GASLIGHT CLUB, INC., an Illinois corporation, Defendants-Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Edward J. Damer, plaintiff, brought an equitable action against defendants, Burton Browne and Gaslight Club, Inc., for specific performance of a written agreement asking that the court order defendants to deliver to him stock certificates evidencing 9,900 shares of Gaslight Club, Inc., and 120 shares of Clubmen, Inc.

The plaintiff is a shareholder in the defendant corporation, Gaslight Club, Inc., an Illinois corporation; a certificate of incorporation was issued July 29, 1953. Plaintiff was one of the original investors, and for $1,000 paid to the defendant corporation he purchased 30 shares of the original issue of common stock, evidenced by Certificate No. 12, dated July 30, 1953. On or about December 28, 1953, a certificate of amendment to the articles of incorporation of Gaslight Club, Inc. was issued by the Secretary of State of Illinois, increasing the authorized capital of the corporation from 1,000 to 3,000 shares without par value. The plaintiff, in partial exercise of his preemptive rights, acquired an additional stock certificate for 30 shares of common stock, evidenced by Certificate No. 29, dated May 3, 1954.

On March 26, 1954, Burton Browne, one of the defendants, had issued to himself 1,020 shares, and on December 8, 1954, 960 shares, making a total of 1,980 shares of common stock of Gaslight Club, Inc., for which he paid $1.00 a share.

The plaintiff first filed a complaint, then on June 21, 1962, filed an amended complaint, which was in two counts. Count I referred

to the defendant, Burton Browne; Count II referred to the defendant, Gaslight Club, Inc. Both defendants filed answers to the amended complaint; by leave of court Browne filed an amended answer. The case was referred to a master in chancery, and after plaintiff's proofs were closed, the plaintiff asked leave of the court to file a second amended complaint to conform to proof, and the court, by an order entered September 4, 1963, referred the motion to the master. The second amended complaint, as the master has indicated in his report, was substantially the same as the first amended complaint, except that it set up that on October 1, 1960, shares of Clubmen, Inc., a subsidiary of defendant corporation, were distributed to stockholders of defendant Gaslight Club, Inc., on a share-for-share basis, without cost, and that Browne received 120 shares of Clubmen, Inc., on the 120 shares of Gaslight Club, Inc., held by Browne, but which are claimed by the plaintiff. In his report the master recommended that the second amended complaint be filed. It was filed, and in its decree the court indicated that the cause was heard upon "the Complaint, First Amended Complaint and Second Amended Complaint, of the Plaintiff EDWARD J. DAMER, the several answers of the Defendants, BURTON BROWNE and GASLIGHT CLUB, INC., to the Amended Complaint, and the Amendment to said Answers and the Supplemental Answer of Defendants to the Second Amended Complaint, . . ."

There is no question that after the purchase made by Browne of the 1,980 shares of common stock of Gaslight Club, Inc., for which he paid $1.00 a share, on March 26, 1954 and on December 8, 1954, Mary J. Hurn and Charles W. Patton, subscribers to the original issue of the corporate stock [30 shares each], brought suit in February 1955 [the date of the filing of the suit was stipulated]. The suit was filed in the Superior Court of Cook County against the present defendants, praying inter alia for cancellation of the 2,000 shares issued pursuant to the amendment of the articles of incorporation, dated

December 28, 1953. Damer, as a subscriber to 30 shares of the original issue of corporate stock, contends he was entitled to preemptive rights thereon, or, in the alternative, to cancellation of the 2,000 shares. In consideration of Damer's forbearance from entering the Hurn suit as a party-plaintiff, and in further consideration of his execution of a waiver and release in order that the Hurn suit could be settled against the defendants—which settlement required waivers and releases from all stockholders—Burton Browne, on February 10, 1956, agreed to sell plaintiff 120 shares of common stock of the corporation for $1.00 per share, and to deliver the stock to plaintiff within 30 days. On February 10, Browne confirmed the agreement in writing as follows: "I agree to sell you 120 shares of stock in Gaslight Club, Inc. for $1.00 per share. I will deliver the stock within 30 days." [Plaintiff's Exhibit 4.]

Damer's complaint as amended asked for specific performance and that Browne be ordered to deliver to him properly executed and sealed certificates of common stock of Gaslight Club, Inc., in the amount of 9,900 shares, and of Clubmen, Inc., in the amount of 120 shares (collectively representing the then equivalent of 120 shares of Gaslight Club, Inc., on the date of the agreement, after giving effect to stock splits and other distributions).

Evidence in the case was heard by a master in chancery who filed his report recommending findings of fact and conclusions of law. The plaintiff filed objections to the report of the master, which objections were overruled by the master and stood as exceptions to his report. The exceptions were all overruled by the court on October 2, 1964, and a decree was entered in accordance with the report, finding that the agreement between the parties was an option; that no act was done by the plaintiff in the exercise of the option within the duration of the option as extended; and that plaintiff

failed to make a legal tender of the purchase price prior to April 25, 1962. On November 2, 1964, the plaintiff filed a motion to vacate the decree, or, in the alternative, for a new trial. On January 11, 1965, the court denied the plaintiff's motions, and from that order and the decree entered by the court, the plaintiff takes this appeal.

The plaintiff's theory is that the agreement of February 10, 1956, between him and the defendant was a bilateral contract, resting partly on oral and partly on written evidence. Plaintiff further asserts that the trial court committed error in allowing the defendant to file new affirmative defenses for the first time after the evidence had been closed and the master's report submitted to the parties. In this court defendant Browne contends that the memorandum in question was an option based on consideration which gave the plaintiff 30 days in which to exercise his rights, which option was extended by Browne until June 10, 1957.

Browne now contends that he tendered the stock certificate for 120 shares of Gaslight Club, Inc., but that Damer requested instead that two certificates be issued for 60 shares each. Browne states that a tender of two certificates was then made and was refused by Damer; that that rejection by the plaintiff in and of itself terminated the option. The defendant, Gaslight Club, Inc., contends that the only issue herein involved relates solely to Browne, and that no evidence has been adduced which should make the club a party to the suit. Both defendants concur in the findings of the chancellor except as to the assessment of costs, which they assert should be charged entirely to the plaintiff.

The first question which must necessarily be determined by this court is whether the agreement between plaintiff and defendant Browne was a bilateral contract or an option which was to terminate

in 30 days. From the evidence it appears that Browne had acquired a large number of illegally issued shares and was concerned about any further complications by shareholders arising from the Hurn suit, and his greatest problem--and the last holdout to sign the release--was Damer.

Browne testified that on or about May 11, 1955, he had a conversation with the plaintiff concerning the Hurn case, at which time he asked plaintiff if he was going to enter the Hurn case, and the plaintiff said he had not made up his mind; that Browne then said, "I wish you wouldn't. I think it would be much better for you to stay out of the Hurn case, and I would like to make it an independent affair rather than a group of stockholders. And, I have not given up trying to persuade Mary Hurn to withdraw it." Browne testified that plaintiff then asked, "If I should stay out, what would there be in it for me?" Browne said he told him, "Well, you have, up to now, 60 shares of stock. I will give you 60 shares of my stock. I will double what you are holding, if you will stay out of it." He stated that the plaintiff said he would consider it.

Browne further testified that he thought the second conversation took place in the Beau Nash Room at the Ambassador Hotel, at which time he offered plaintiff a stock certificate for 60 shares [Stock Certificate No. 48, Defendant's Exhibit 18]. Browne stated that he offered to give Damer 60 shares of stock for his not entering the Hurn case, and remembered signing the stock certificate on the table in front of Damer; that Damer said he had not made up his mind. Continuing his testimony Browne stated:

> "After that I returned the stock certificate, defendant's exhibit 18, to Mr. Fein's [attorney] office. On February 10, 1956, I had a meeting with just Damer and myself in my office. I showed Mr. Damer joint exhibit 5 and said that if it were signed by all the shareholders in the Gaslight Club it would close the Hurn case. I told Mr. Damer that everyone else had agreed to the stipulation and that all

> we needed was his signature. He said, 'What is in it for me?' so, I said, 'Well, I will give you out of my shares 60 shares of stock.' And, he said, 'No, no, no, no, that wasn't sufficient,' and, I said, 'Well, everyone is taking stock and paying a dollar a share for it, and I will sell you 60 shares at a dollar a share, and you don't have to put up the $900.00 for debenture notes. That would be the normal procedure, and he said, 'No, that was not enough.' And I said, 'Well, I have to have your signature on this, or the whole agreement is of no avail.' And he said, 'Well, all right, we will talk about it.' So I said, 'Well, all right, You have 60 shares. I will give you 120 shares at one dollar a share, if you will sign this agreement and give me the money.' And he said, 'Well I will sign the agreement, and put it (sic) on a piece of paper, this agreement.' So, I wrote on a piece of paper [Plaintiff's Exhibit 4]. . . Then Mr. Damer signed joint exhibit 5."

The testimony of plaintiff Damer with reference to the preceding incident in the case is in substantial accord with that of defendant Browne.

In 1 Corbin on Contracts, section 3, it is said: "A very common definition is that a contract is a promise enforceable at law directly or indirectly. This has the advantage of brevity, and it is perhaps as useful a definition as any that has been thus far suggested." In section 11, "offer" is defined as "an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms. An offer looks forward to an agreement--to mutual expressions of assent." In section 23 Corbin states: "The determination of whether a certain communication by one party to another is an operative offer, and not merely an inoperative step in the preliminary negotiation, is a matter of interpretation in the light of all the surrounding circumstances."

Applying the rules above stated to the transaction in the instant case, we find that on February 10, 1956, the defendant, Browne, told Damer that he would give him 120 shares at $1.00 per share if Damer would sign the agreement with reference to the Hurn case. Damer requested that Browne put the offer in writing, which he did, and

Browne said he would sign the agreement with reference to the Hurn matter. Browne's statement to Damer was an offer; when Damer said he would sign with reference to the Hurn case a valid bilateral contract came into being. The consideration for the said contract was the mutual promises of Damer and Browne. Damer thereupon signed the document with reference to the Hurn case and performed his part of the contract. Browne had given Damer a document in writing which stated that he would sell Damer 120 shares of stock in the Gaslight Club for $1.00 a share; the document further stated, "I will deliver the stock within 30 days." That agreement on the part of Browne can under no theory of law be considered an option. It is one of the terms of the bilateral contract between Browne and Damer. There is nothing to indicate that it merely gave the right to Damer to offer $120.00 within the 30 days, which would require Browne to transfer the stock. The entire burden of taking the initiative rested upon Browne.

As we have pointed out, the contract was in the first instance based on the consideration of mutual promises and upon the further consideration of Damer having fully performed that portion of the contract which he bound himself to perform. In view of the admitted value of the stock at that time, the purchase price of $1.00 per share to be paid by Damer was nominal, and the suggestion that the shares were offered to him by Browne and refused by Damer overtaxes credulity.

This interpretation of the transaction is supported by the discussions and negotiations testified to by both Damer and Browne. Browne was vitally interested in getting a waiver of all of Damer's rights with reference to the stock involved in the Hurn case. He got it, and in return made a promise to do certain things in the future.

The master in his report discussed at considerable length the issues raised by the pleadings and stated that the only issues to be determined by the court are, what the legal import of the document of February 10, 1956 should be, and whether Damer legally exercised his option to purchase the 120 shares. The master also stated that there was no question that consideration was given for the agreement, and that the document was a valid option granted on February 10, 1956, by Browne to Damer for the right to buy 120 shares at $1.00 per share; that Browne extended the time for the exercise of the option to June 10, 1957, or a few weeks thereafter. He then pointed out that there was conflicting testimony; that Browne testified he had tendered the stock to Damer on or about June 10, 1957, and that Damer refused to pay the $120.00 for the stock. Damer testified that on many occasions after June 1, 1957, he requested Browne to give him the shares of stock and that he would pay for them. The master then said:

> "There are certain inconsistencies in the testimony of both parties. Why should Damer, who had, by both Browne's and his own testimony, been a thorn in Browne's side during the settlement of the Hurn litigation, pressing him for additional shares of stock, refuse to pay a sum of money which was far below the book value of the stock and, in fact, was less than the per share earnings of the corporation on the date that Browne testified he tendered the stock to Damer? Why didn't Damer at that time, testifying as he did to his distrust of Browne when Browne failed to deliver the stock certificates in accordance with his promise after the Hurn lawsuit was paid for, make a formal written demand on Browne and file his lawsuit immediately? . . .Why would Browne surrender sufficient certificates so that 465 shares of stock would be delivered to other shareholders and refuse to abide by his agreement with Damer after having acknowledged the same in some conversation with Harold Fein, which was reflected in a letter which Fein wrote to Browne? . . . These are the unanswered questions which have troubled the Master, since it is difficult to understand the motives of the litigants in this case, but the Master would have to determine which litigant was to be believed on an over-all basis, because there were inconsistencies in both stories. . . . The Master cannot believe that Browne conspired in 1955, 1956 and

> 1957 to issue certificates for shares of stock for the sole purpose of defeating Damer's right to these shares and to prepare a defense to a lawsuit that was not yet filed. The Master cannot believe that Damer would have failed to exercise his rights at $1.00 per share on such favorable terms and receive a bargain price for these shares."

The master then found as a conclusion of law that the agreement between the parties was an option agreement and stated that he was of the opinion that there were no further tenders by Damer after June 1957 except for his written demand prior to the filing of this suit; nor that there were any further offers by Browne to extend the time for the exercise of the option. He stated:

> "An option is a fragile right subject to expiration and subject to prompt acceptance prior to its expiration by the optionee. The optionee is under no legal obligation to exercise it and may, if he desires, allow it to expire without any liability on his part, unless the option agreement provides otherwise."

In his findings of fact, the master stated that Browne on February 10, 1956, executed an instrument giving Damer the right to purchase 120 shares of Gaslight Club, Inc., for $120.00, within 30 days from the date of the instrument; that this right was extended by Browne for a period which would not extend past June 24, 1957; that the consideration for the agreement was Damer's execution of his consent to a settlement agreement in the Hurn lawsuit against Gaslight Club, Inc. The master further found:

> "Browne tendered to Damer 120 shares of stock on or about June 10, 1957 and also about ten days or two weeks thereafter.
>
> "Damer had in his possession at that time uncashed checks of Gaslight Club, Inc. in the approximate amount of over $1,500.00.
>
> "Damer refused the tender of the stock by failing to make the prescribed payment prior to June 24, 1957, and failed to make a tender to Browne of the purchase price prior to April 25, 1962."

The master stated:

> "Gaslight Club, Inc. should be censored for its manner of keeping its stock record book in such a

> fashion that made it almost impossible to trace the issuance and cancellation of stock certificates and inability of a shareholder to know exactly at all times what was occurring with the corporate records and financial structure of the corporation."

The master's conclusions of law were that the instrument of February 10, 1956 was an option by Browne to Damer which expired on or about March 10, 1956, but was verbally extended to a date prior to June 24, 1957; that Damer failed to make legal tender prior to April 25, 1962; and that Gaslight Club, Inc. was not legally liable "for the actions of Browne in extending this option to Damer." Objections to the master's report filed by both plaintiff and defendants were overruled and taken as exceptions before the court. Among the objections of the plaintiff were: 1) the master erred in his finding that the agreement by the parties was an option agreement, whereas the instrument itself and the evidence show that it was a written portion of a contract resting partly in writing and partly in parol, supported by a consideration, in which writing "Browne has obligated himself, for the aforesaid valuable consideration to deliver to the plaintiff 120 shares of Gaslight Club, Inc. within 30 days of February 10, 1956; that no further performance on the part of plaintiff was required until delivery of the shares by Browne; that Browne is in default of his agreement to deliver said shares; that plaintiff has a right to Browne's performance, which right has not lapsed because of laches"; 2) that the master further erred in his finding "that defendant has failed to allege the affirmative defenses of tender, repudiation and rejection as set forth in these findings and may not avail himself of such defenses albeit matter supporting said defenses appears in the evidence."

Plaintiff's objections to the master's report were filed on June 19, 1964. On the same date a "supplemental answer" of defendants Browne and Gaslight Club, Inc., was filed and in that answer

they set out the following:

> "For further answer to the allegations of paragraphs 9 and 10, of the Second Amended Complaint, these defendants deny that Burton Browne failed to deliver the stock within thirty days and state the facts to be that Burton Browne extended the term of the option for a period to approximately June 10, 1957 and that on or about said latter date and again about ten days thereafter he did in fact tender to Plaintiff certificates for 120 shares but that Plaintiff refused said tender and at the same time refused to pay $120.00 to defendant Burton Browne."

Further objections to the master's report were filed by the plaintiff on August 4, 1964, by leave of the court. The question was again raised as to the master's error in concluding that the instrument of February 10, 1956, was an option; his further error in his conclusion that Damer failed to make legal tender prior to April 25, 1962, when in fact, Damer was not required to make tender; and the master's disregard of Damer's evidence that he had on many occasions offered to pay for the stock.

On October 2, 1964, plaintiff Damer filed a motion to vacate the decree, or in the alternative, for a new trial, in which motion he set out that it was an abuse of discretion for the master to recommend and for the court to allow the filing of Browne's supplemental answer after the trial had concluded. He bases this argument on the fact that the answer raised for the first time the affirmative defense of tender and rejection of the subject 120 shares of Gaslight Club, Inc. stock, "which tender and rejection allegedly occurred five years prior to the commencement of the instant suit. Such tender and rejection, had they occurred, were within the particular knowledge of said defendant and his counsel and no reason whatsoever was advanced why said affirmative had not been pleaded in the original answer or in an amendment thereto filed at the commencement of the trial. Such defense is the sole basis for the Decree in favor of defendant."

In plaintiff's alternative motion a new trial was requested in order to permit the plaintiff to put in evidence contradicting the evidence of defendant Browne. The court denied both motions, and this appeal results.

The court stated in its decree that the cause was before the court on a complaint, first amended complaint, second amended complaint of the plaintiff, the several answers of defendants Browne and Gaslight Club, Inc., to the amended complaint, the amendment to said answers, and "the supplemental answer of defendants to the second amended complaint, which supplemental answer adopted and reaffirmed the separate answers theretofore filed by said defendants." In his report the master had recommended that the court should give the plaintiff leave to file his second amended complaint and that defendants' answer and supplemental answer stand as their answer to the second amended complaint. It was also recommended that the defendants be given leave to file instanter their supplemental answers.

Since we find that the agreement between the parties was a bilateral contract and not an option, the entire hearing must be scrutinized in a completely different light. Where a suit in chancery has been referred to a master, a hearing held, and the master's report and findings of law and fact filed with the trial court after objections have been overruled and permitted to stand as exceptions, the trial court has the right and duty to consider the evidence and determine whether or not the findings of the master are supported by a preponderance of the evidence. Some of the cases hold that there is something of the nature of a jury verdict in the master's findings of fact. However, in Johnson v. Johnson, 1 Ill. 2d 319, the court takes the view that while the findings of fact do not carry the same weight as a verdict of the jury they are entitled to due weight. In determining whether the findings of the master are supported by

the evidence the question for the trial court, under the better rule, is: are the findings supported by a preponderance of the evidence?

In his report the master makes statements which would indicate that he had considerable doubt as to his factual findings. Treating the agreement as a bilateral contract, the duty rested upon Browne to deliver to Damer within 30 days 120 shares of Gaslight Club, Inc. stock. The duty rested upon Damer to accept the tendered stock and to pay $120.00 for it. Failure of either party so to act would constitute a breach of the contract. Treating the document as it should be treated, as a contract, Browne's extension of time was of no avail to him and of no value whatsoever. It was his duty to act by tendering the stock. When the evidence was being heard before the master there was no pleading which would permit testimony by Browne of tender of the stock, and without proper pleading of a breach on the part of Damer, that evidence could not be considered by the master in reaching his finding. If there had been a tender of stock as testified to by Browne, it seems very strange that it would not have been pleaded, no matter whether the agreement was considered by Browne's attorneys to be an option or a bilateral contract.

The condition of the records of the corporation was also quite astonishing, as the master pointed out in his report. The two stock certificates Nos. 73 and 75, which Browne testified he tendered to Damer, were dated June 10, 1957, and they appear on the stock transfer book of Gaslight Club, Inc. However, in the same book, and preceding their entry, are certificates Nos. 68 and 69, each bearing the date of October 1, 1960. Possibly that fact should have set to rest the master's doubt expressed when he stated he "could not believe that Browne conspired in 1955, 1956 and 1957 to issue certificates for shares of stock for the sole purpose of defeating Damer's right to these shares and to prepare a defense to a lawsuit that was not yet

filed." On oral argument counsel for Browne admitted he could not explain the discrepancy. From the record it might be assumed that these shares of stock in question were issued when it was thought they became necessary to the defense. Taking that in connection with the fact that the issuance and tender of the shares of stock was not pleaded at any time, it throws great doubt upon Browne's testimony.

Also casting doubt on Browne's testimony is the fact that at the time he testified that Damer refused the tender of the stock, Damer held in his possession uncashed checks of Gaslight Club, Inc. for something in the neighborhood of $1,500.00, which he was holding until the question of the delivery of the 120 shares of stock was settled. As we have pointed out, the fact that the stock, which it was agreed was of a much greater value than $1.00 per share, should be refused by Damer when it allegedly was offered to him by Browne, is incredible.

The master found that the value of each share of Gaslight Club stock as of February 10, 1956, and June 24, 1957, was substantially higher than $1.00; and, in fact, that the annual earnings per share exceeded $1.00. Furthermore, in the record Damer testified categorically that he had never seen the stock certificates in question which Browne had testified he tendered to him. Damer further testified--and no contradiction appears in the record--that he attended all the Gaslight Club shareholders meetings; that Browne was present at all the meetings, as was his attorney; and that at every meeting which Damer attended he addressed the chair and objected to the proceeding because of his not having been taken care of on the stock, and that nothing was said by Browne or his attorney in response to his statements. This testimony of Damer's is uncontradicted.

The plaintiff had argued before the master concerning the master's preliminary report, and in his brief filed with the master at the same

time, raised the point that the master could not consider the testimony of Browne with reference to a tender since there was no allegation in the pleadings to support it. Promptly thereafter the defendants filed their supplemental answer with the master. The master recommended that it be filed and the court permitted its filing and considered it as a part of the pleading in its decree. In their supplemental answer the defendants, Browne and Gaslight Club, Inc., raised no points except that they alleged that Browne had extended the "option" for a period to approximately June 10, 1957, and that on that date he tendered the plaintiff certificates for 120 shares; that the plaintiff refused the tender and at the same time refused to pay $120.00 to the defendant, Browne. This was the first time the defendant alleged that he had tendered stock to Damer.

A decree cannot be based upon a defense which is not pleaded, even if there is testimony in the record tending to support such defense. Hunsley v. Aull, 387 Ill. 520; Parker v. Dameika, 372 Ill. 235. In Leitch v. Sanitary District, 386 Ill. 433, the court said:

> "Citation of authorities is not necessary in support of the well-established rule that a party to a suit, either at law or in equity cannot have relief under proofs without allegations, nor under allegations without proof in support."

In Oetting v. Graham, 373 Ill. 247, the court quoted from Angelo v. Angelo, 146 Ill. 629, as follows:

> "The rule that proofs without corresponding allegations are in equity as unavailing as allegations without proofs, is familiar to every lawyer."

In Hunsley v. Aull, 387 Ill. 520, the court said:

> "It has long been the rule in chancery that a defendant is bound to apprise the opposite party of his claims and set them forth in his pleadings. If he does not, he is precluded from urging such defense even though it may appear to be within the evidence. (Johnson v. Johnson, 114 Ill. 611.)"

The allegations contained in Browne's "supplemental answer" that he had tendered stock to the plaintiff, if true, were fully within the knowledge of Browne at the time the original answers

were filed. It was apparently an after-thought which came into existence at the time when Damer argued before the master concerning the master's preliminary report, and in his brief filed with the master at that time, he again raised the same point with reference to allegations and proof. As soon as the chancellor in the decree apparently gave leave to plead the tender of the stock on the part of Browne, Damer immediately moved to vacate the decree.

The master erred in recommending that the "supplemental answer" be filed and the chancellor erred in treating it as having been properly filed. Applying the rule that evidence in the record without corresponding allegations in the pleadings is unavailing in an equity suit, neither the master nor the trial court could consider Browne's testimony that he had tendered 120 shares of stock to the plaintiff and the plaintiff had rejected the tender. Had they considered it they must have rejected it because of its incredibility.

After a careful reading of the record it appears to us that the finding of the master, approved by the trial court, dismissing the complaint or complaints filed by Damer against Browne, is against the manifest weight of the evidence.

Gaslight Club, Inc. also argues that it was improperly made a party to the suit. Nobody has ever claimed that the contract was the contract of the corporation, and it did not purport to be. The decree of the trial court approving the finding of the master recommending that the Gaslight Club be dismissed from the suit was proper, and the decree will be affirmed as to the corporation.

On November 15, 1961, the stock of the corporation was split 74 for 1; on or about December 21, 1962, a 10 per cent stock dividend was declared on outstanding shares of Gaslight Club, Inc., and on or about October 1, 1960, shares of Clubmen, Inc., a subsidiary of the

defendant corporation, were distributed to stockholders of Gaslight Club, Inc., on a share-for-share basis, without cost to stockholders. The 120 shares of the agreement are now allegedly the equivalent of 9,900 shares of common stock of Gaslight Club, Inc. In equity, the original res in issue will be traced, if possible, to that into which it has been transformed, and the plaintiff is entitled to the transformed res, even though its value is far greater than the original.

For the reasons assigned, the decree of the Circuit Court is reversed as to Browne and the cause is remanded with directions to the trial court to determine, in accordance with this opinion, the amount of stock which should be issued to Edward J. Damer; to enter a decree against defendant Burton Browne for specific performance of the contract.

The trial court should make a new adjudication taxing the master's fees and costs in accordance with the findings expressed in this opinion.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED WITH DIRECTIONS.

ENGLISH P.J., and DRUCKER, J., concur.

50990)
) Consolidated
50991)

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PAUL ARNOLD and JUANITA ARNOLD, Defendants-Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a bench trial, defendants were convicted of armed robbery and aggravated battery. Paul Arnold was sentenced to concurrent terms of one to five years for aggravated battery and four to ten years for armed robbery. Juanita Arnold was sentenced to concurrent terms of one to five years for aggravated battery and two to eight years for armed robbery. Defendants contend that the State failed to prove them guilty beyond a reasonable doubt.

The complaining witness, Jack Brent, a mechanic, was in a Madison Street bar in the early morning hours of April 25, 1965. He was solicited by a prostitute, and they agreed on a fee of $5.00. He accompanied her to a basement at 1438 West Monroe Street, where she wanted more money. A man appeared and demanded Brent's wallet and, upon refusal, repeatedly struck Brent with a lead pipe and stabbed him. Brent surrendered his wallet, and the man took all the money (about $6.00) and then returned the wallet. Brent, bleeding badly, was let out of the basement by an alley doorway. He reported what happened to the police and went to the Cook County Hospital, where his head and hand were stitched.

On April 26, 1965, Policemen Burns and Kelly, of the

robbery squad, showed Brent photographs of about 70 to 80 males and females. Out of a second group of 30 photographs, Brent picked out two, and on April 27th identified the defendants at the Maxwell Street police station. There was no line-up.

Both defendants denied knowing Brent or having participated in the robbery. Juanita Arnold testified that she lived on the first floor at 1438 West Monroe Street with Paul Arnold, her common-law husband; that she was a prostitute and used the basement rooms for prostitution.

Paul Arnold testified that he lived at 1438 West Monroe Street, and the Brent charge of robbery was a frame-up of the police because they wanted Juanita "to take the stand to pin me down with a murder or something like that." On cross-examination he stated, "I have never attacked any persons that my wife brought into the basement. I was present at this place on April 26th, 1965, when my wife brought in a man by the name of Silva, Rudolfo Silva. He was cut there, because of a fight. I was present when he was attacked."

Defendants declare that "the only questions presented by this review is whether the complainant Jack Brent was a credible witness and whether his identification of the defendants was positive."

Defendants complain about the police procedure, which resulted in the identification of the defendants, and assert the weight of the identification was impaired because "the complainant was taken to the Maxwell Street police station where he was permitted to view the defendants as they sat in a small room on the second floor. There he identified Paul Arnold but did not identify Juanita Arnold. As an excuse for not identifying Juanita,

complainant testified that he 'had a certain compassion for her,' to which testimony the trial court sustained an objection. In answer to a leading question, the complainant testified that 'later' he identified her."

Defendants argue, "If the police were interested in ferreting out truth rather than merely seeking conviction, a police lineup was an absolute necessity at bar. There was no excuse for not placing the defendants in separate lineups. No excuse was offered. * * * Once an 'identification' is made under such circumstances its objectivity is forever after destroyed. The damage is done; it cannot be undone." Cases cited include People v. Botulinski, 383 Ill. 608, 50 N.E.2d 716 (1943), where the court said (p. 615):

> "We have held that where one accused of a crime is brought alone before the witness for the purpose of identification, such identification is not entitled to the same weight and credibility as where the witness picks out the accused from a number of persons brought before the witness. * * * 'The proper way is to have the witness, without suggestion from any officers or any interested persons, pick out the guilty party from a number of persons unknown to the witness.'"

The State contends that line-ups are not mandatory. Cited is People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963), where the court, after reiterating its statement regarding the proper identification procedure, said (p. 509):

> "However, 'There is no requirement in the law that an accused person must be placed among a group of persons for the purpose of testing the ability of a witness to identify him as the guilty person,' * * * and the manner 'does not render the identification testimony incompetent, but only goes to the weight of the evidence.'"

Because of the extended opportunity of Brent to view the

defendants at the time of the occurrence, we are not persuaded that the pronouncements in People v. Botulinski apply here. As to Juanita Arnold, defendant met her at a bar, conversed with her about money and where to go, and she selected 1438 West Monroe Street. When they entered the building she turned on a light in the room, and he was able to describe the contents of the room. It was in this lighted room that he saw defendant Paul Arnold with "the pipe in the right hand and the knife in the left hand." Arnold repeatedly struck Brent with the pipe and cut him with the knife until Brent gave Arnold the wallet. Arnold "removed all the bills and he gave the wallet--he took the money and he handed it back to me. He did not take anything else from the wallet. He said something to the woman, but I wasn't paying any particular attention because my shoulder was hurting and I was bleeding and my head was all banged up too. During this entire time, Juanita Arnold was standing there looking at me almost indifferently. They kept talking and after he finished the conversation, whatever it was, he said to me, 'Come on,' * * *."

The identification of the defendants by Brent was buttressed by the testimony of Police Officer James Burns. He interviewed Brent on April 26th and showed him photographs of males and females. They then walked down Monroe Street, and Brent "pointed out a building as the building where he had been two or three nights previous when he was robbed. We went in this building and Jack Brent took us down to the basement and into a small room in the back of the basement. * * * The following morning, we showed him some additional photographs and he viewed them. He picked out a photograph of Juanita

Arnold and Paul Arnold. * * * We arrested the two defendants on April 27th, 1965, * * * at 35th Street and Indiana Avenue." Brent identified the two defendants as the offenders in the robbery, and Paul Arnold said he had never seen Brent before in his life. Defendants gave their home address as 1438 West Monroe Street.

Applying the principles announced in People v. Boney, we find Brent had ample opportunity for observation and he made positive identification of the defendants. We also note that here there was the additional element of a short lapse of time between the crime and the identification. We do not find the proof here to be "so unsatisfactory as to justify a reasonable doubt of guilt," even though defendants were not placed in a line-up at the time Brent identified them at the police station.

The judgment of the Circuit Court of Cook County is affirmed as to both defendants.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51520

NAPOLEON BYRD, JAY GORAN, Trustee under Trust No. 2525,	)	
Plaintiffs-Appellees,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
EARL JOHNSON,	)	COOK COUNTY.
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order which denied his motion to vacate a default judgment. The motion was filed within 30 days from the entry of the judgment order, and defendant contends the affidavit filed in support of his motion stated proper grounds for relief under section 50(6) of the Civil Practice Act.

The complaint alleges that on September 6, 1965, defendant negligently operated an automobile, which "struck the parked station wagon, property of plaintiff, Napoleon Byrd, which in turn struck the property of Jay Goran, Trustee under Trust No. 2525 causing damage which would not have occurred but for the defendant's act." The judgment order awarded Byrd $300 and costs and Goran $150 and costs.

Defendant's supporting affidavit states "that the case was on the trial call for the first time up and the plaintiff did not call or contact the attorney for the defendant prior to the day of trial; that no call was made to the office of attorney for the defendant notifying him that a case was being held on day of trial; and attorney for the defendant was held on call by Judge Buckley on case of Horne v. Bernal, 65 M3-10666 in Harwood Heights and was called out at 9:30 AM, March 4, 1966, the day of this ex parte hearing."

Defendant argues, "In the case at bar justice will not be

served by allowing this judgment to stand. The record shows that the defendant did all that was required of him up to the day of trial. Neither the defendant nor his attorney should be penalized for a mistake which apparently has occurred due to the rush of business in the Municipal Court."

Plaintiff Byrd asserts that he is a working man and lost a full day's pay and argues, "Who is suffering the greater injury here--the plaintiff, who has already been damaged, who has already waited for more than a year for compensation, and who has already lost a day's work and who would lose another day through no fault of his own; or the defendant who, by a simple telephone call, could have stopped all of this."

A discussion of the authorities cited by both sides is unnecessary. In Ewert v. Ewert, 41 Ill. App.2d 161, 190 N.E.2d 147 (1963), this court said (p. 166):

> "Section 50(6) of the Civil Practice Act provides that 'the court may in its discretion, * * * on motion filed within 30 days after entry thereof set aside any final order, judgment or decree upon any terms and conditions that shall be reasonable.' 'Whether or not a court should vacate and set aside judgments and orders previously made generally rests in the sound discretion of the court, depending on the facts presented.' * * * And it is only where there has been an abuse of discretion that a reviewing court will interfere."

Under the circumstances portrayed here, we are not persuaded that the trial court abused its discretion in denying defendant's motion to vacate. Therefore, the order appealed from is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51567

RCA SERVICE COMPANY,

Plaintiff below,

and

HELLER CONSTRUCTION COMPANY,

Counter-Plaintiff, Appellee,

v.

A B FIREPROOFING COMPANY,

Counter-Defendant, Appellant,

and

JACK GALTER and DOLLIE M. GALTER,

Defendants below.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

A B Fireproofing Company, a third-party defendant, appeals from a summary judgment entered in favor of Heller Construction Company, the third-party plaintiff, requiring Fireproofing to indemnify and keep harmless Heller Construction Company against all liability or judgments for damages arising out of the claim of the plaintiff, RCA Service Company. Fireproofing contends there was a genuine issue of a material fact and the motion for summary judgment should have been denied.

On August 10, 1964, Heller, as general contractor, entered into a contract with the owner of the Carriage House Apartments to perform certain construction work. On October 2, 1964, Heller subcontracted with Fireproofing to erect a brick wall on the upper floors of the Carriage House. On November 12, 1964, the wall fell on and destroyed two of plaintiff's trucks, and plaintiff sued Heller and Fireproofing for damages to the vehicles.

Heller then filed a counterclaim against Fireproofing,

seeking indemnity based upon the contract entered into between Heller and Fireproofing. The contract provision in question provided:

> "Art. VIII.--The Sub-contractor hereby agrees to indemnify and keep harmless the Contractor against all liability, claims, judgments and demands for damages arising from accidents to persons or property occasioned by the Sub-contractor, his agents or employes, and against all claims or demands for damages arising from accidents to the Sub-contractor, his agents or employes, whether occasioned by said Sub-contractor or his employes or by the Contractor or his employes, or any other person or persons; and the said Sub-contractor will defend any and all suits that may be brought against the Contractor on account of any such accidents and will reimburse the Contractor for any expenditures that said Contractor may make by reason of such accidents."

The summary judgment was entered in favor of Heller after considering the pleadings, the supporting affidavit of Heller and the counter-affidavits of Fireproofing and hearing the arguments of counsel. The counter-affidavits of Fireproofing show "that erection of said brick wall was finished approximately October 22, 1964; that on November 12, 1964, A B Fireproofing had no men on the job site; that said wall was meant to be a support wall and was not to remain a free-standing wall; that Heller Construction Company knew that the wall was finished and approved of its structure; that it was Heller Construction Company's responsibility to support the brick wall; that three weeks after the wall was finished, Heller Construction Company still failed to support said brick wall; * * *" and "that the wall was constructed in a manner stronger than was called for in the original plans; that there was no request from the general contractor, Heller Construction Co., to do any additional work on this wall after it was completed and inspected on or about

October 22, 1964."

Fireproofing contends that there was a genuine issue as to whose acts "occasioned" the damage to plaintiff's trucks. Fireproofing asserts that it was Heller's negligence that presented an opportunity or ground for causal agencies to act and cause the wall to collapse, and that "the indemnity agreement does not indemnify Heller for his own negligence. The indemnity agreement merely indemnifies Heller for claims occasioned by Fireproofing."

Initially, we agree with Fireproofing that (1) a "summary judgment may only be granted where there is no genuine issue as to any material fact," and "the right to a summary judgment must be free from doubt"; and (2) an ambiguous contract will be construed most strongly against the party who prepared the contract and chose the words used, since he is the one who is responsible for the ambiguity (Cemetery Ass'n v. Village of Calumet Park, 398 Ill. 324, 333, 75 N.E.2d 874 (1947)), and an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract. Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 433, 70 N.E.2d 604 (1947).

Heller contends "on the basis of its affidavits, Fireproofing constructed an unsupported brick wall and left the site of construction while the wall was free-standing and unsupported. Fireproofing's activity in building a free-standing brick wall and furnishing and presenting an unsupported wall upon its departure from the construction site, provided an opportunity for other causal agencies to act upon the wall and to negligently

or otherwise cause, by act or omission, the wall to collapse."

In our view of this case, it is unnecessary to discuss the authorities cited by both sides which construe indemnity agreements similar to the one in question.

The determinative factor, as we examine this record, is that nowhere in the pleadings, exhibits or affidavits is there any provision which, directly or by implication, demonstrates that Heller undertook to support the instant wall once it was completed, in order to charge it with its own negligence. Factual allegations are lacking to support the alleged conclsuion of Fireproofing, "that it was Heller's responsibility to support the brick wall." Therefore, this record does not present a genuine issue of that material fact.

For the reasons given, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

50978

WALTER J. RYLKO, Plaintiff-Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT
MAX KATZ & RAYMOND GOLZ, Defendants-Appellees.	)	COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This appeal is taken from judgments entered on verdicts in favor of Max Katz and Raymond Golz against plaintiff in his actions to recover for injuries allegedly sustained in two separate automobile accidents in 1957 and 1961. On plaintiff's motion the two cases were consolidated for trial in March of 1964. No question is raised about the propriety of the consolidation.

On January 3, 1957, plaintiff, a police officer, apprehended a Mrs. Miller for a traffic violation in a southbound lane of the north outer drive near the Drake Hotel in Chicago. Plaintiff testified he stopped his squad car some three feet behind the Miller automobile in the curb lane of traffic, procured Mrs. Miller's operator license, and was sitting in the squad car writing out a summons when the squad car was struck from the rear by the Katz automobile. Plaintiff stated the squad car moved forward and struck the rear of the Miller automobile. Plaintiff was thrown forward and then backward into the back of the front seat. Plaintiff testified he got out of the squad car, told Mrs. Miller of the accident and advised her to inspect her automobile for damage. He stated Mrs. Miller refused to do so and drove away.

The injuries plaintiff claims to have suffered were in the form of a traumatic neurosis and conversion reaction. Plaintiff introduced evidence, through himself, his wife and three doctors, that he suffered an injury in World War II which resulted in a neurosis and that the 1957 accident revived the old neurosis and "triggered" a deteriorating mental condition after the accident resulting in an unstable personality, and inferiority complex, severe anxiety spells and the like.

Defendant Katz testified that his automobile did not strike the squad car very hard, but merely "slid into it." He further stated that no one occupied the squad car at the time of the collision and that plaintiff was standing alongside the Miller automobile talking to its driver. Defendant stated he had to inform plaintiff of the accident.

Mrs. Miller testified that plaintiff was in her sight for some 15 minutes from the time she was stopped until she drove away. She further testified that the reason why it took so long to receive the summons was that plaintiff was incoherent in his speech and that it was difficult to understand what he was trying to say relative to the violation and the summons. Mrs. Miller became apprehensive about her safety due to the location where she was stopped and demanded that plaintiff give her the summons so that she could be on her way. She further stated that her automobile was not struck by the squad car and that plaintiff did not request her to inspect possible damage to her automobile.

Detective Anthony Marubio arrived at the scene a short while after the alleged collision. He testified that the Katz automobile and the squad car were "slightly apart," that the plaintiff looked pale and not like his usual self, and that he did not notice any damage to the Katz automobile or to the squad car.

With regard to the mishap of August 25, 1961, plaintiff on that day was riding as a passenger in the front seat of an automobile owned and driven by a friend, Robert Toft. The Toft automobile was proceeding easterly on Belmont Avenue approaching Cumberland Avenue followed by defendant Golz in his automobile. Both vehicles stopped for a red light at Belmont and Cumberland Avenues, defendant's automobile being the fifth car in the line of traffic stopped for the light. As the light turned green the traffic started moving easterly and attained

a speed of 20 to 25 miles per hour. Approximately 75 feet east of the intersection the Toft automobile made a sudden stop. At this time defendant's automobile was approximately 30 feet to the rear of the Toft automobile.

Defendant Golz testified that he immediately applied his brakes but that his automobile struck the rear-end of the Toft automobile at a speed of about 5 miles per hour. Defendant inspected the damage to the two vehicles and found a dent in the bumper of the Toft automobile and dents in the bumper and fender of his own automobile. After the Toft automobile was driven away defendant noticed a taxicab had stopped approximately 50 feet ahead of the place where the impact occurred, which in turn caused all the vehicles in the line of traffic to come to a halt. Defendant testified he was not able to see the stopped taxicab when seated in his car. Robert Toft testified that he could not remember what type of automobile was in front of his, but that it made a sudden stop and he was only some two feet behind it when he brought his own automobile to a stop.

Plaintiff contends that defense counsel asked prejudicial questions during the trial and made prejudicial statements during closing argument which deprived him of a fair trial; that defense counsel was erroneously permitted to inquire into plaintiff's 1959 arrest and subsequent acquittal for extortion; and that defense counsel's repeated references to plaintiff's army medical records and a pre-existing back injury constituted prejudicial error.

Plaintiff first points to a statement made by defense counsel in closing argument that plaintiff's apparent discomfort after the 1957 accident may have been the result of a "very disappointing conversation with Mrs. Miller," and argues that this statement implies plaintiff attempted to solicit a bribe from Mrs. Miller. The words cited were taken out of context. There is no insinuation in defense counsel's argument that plaintiff attempted any wrongdoing. Defense

counsel made the following argument in response to the inferences that plaintiff looked pale after the alleged accident due to the fact he was physically shaken: "Officer Marubio said [plaintiff] looked white. You know people look white for a lot of reasons. He might have been angry and maybe he had a very disappointing conversation with Mrs. Miller. Maybe he looked white, I don't know." It should also be pointed out that the alleged prejudicial innuendo contained in the statement is the result of afterthought on plaintiff's part; no objection was made by plaintiff at the time the statement was made. If the statement was intended to insinuate that plaintiff attempted to bribe Mrs. Miller, as plaintiff now maintains, such innuendo would have been most obvious at the time the statement was made and it should have been objected to, if at all, at that time.

Plaintiff also states that defense counsel was improperly permitted to question Mrs. Miller concerning the entire conversation she had with plaintiff during the time plaintiff was writing the summons outside her automobile. The defense, however, used this testimony as corroborating the fact that plaintiff was not in his squad car at the time of the occurrence and to show why plaintiff may have looked pale when Detective Marubio saw him after the accident.

Plaintiff further maintains that defense counsel improperly referred to plaintiff's income during several years after the 1957 accident. Plaintiff testified, however, that he was unable to do any work after that accident. The income which plaintiff received in the years after the accident was connected to evidence that plaintiff had worked on and off after the accident at a used car lot and that he also worked with his brother-in-law driving a truck. Defendant's questions in this regard went to the impeachment of plaintiff's testimony that he did not work after the accident.

Plaintiff also states that defense counsel attempted to prejudice the jury by insinuating that plaintiff was a malingerer. First, no objection was made to the question asked by defense counsel in this regard on the cross-examination of one of plaintiff's doctors relative to complaints made by an allegedly injured party in cases of traumatic neurosis and in cases of malingering. Secondly, when the questioning of the doctor on cross-examination is read in its entirety, it is apparent that plaintiff's contention that defense counsel attempted by the particular question complained of to imply he was a malingerer is speculative and unfounded. The other instances of "prejudicial statements" by defense counsel referred to by plaintiff in his brief are likewise foundationless.

The cases cited by plaintiff in support of his position that the foregoing matters prejudiced the jury are distinguishable on their facts. In Gordon v. Checker Taxi Co., 334 Ill. App. 313, an attorney for one of the defendants erroneously stated that a co-defendant had said that the accident in question was "framed," a type of circumstance which clearly does not exist in the case at bar. In Miller v. Chicago Transit Authority, 3 Ill. App.2d 223, there was clear evidence of liability and of substantial money damages suffered by plaintiff, but the jury returned a verdict in favor of plaintiff for a very small amount of money. No reason could be given for this unreasonably low verdict other than prejudice caused by conduct of counsel. The remaining cases cited by plaintiff in this regard are likewise distinguishable.

Plaintiff next maintains that the trial court erred in allowing defense counsel to inquire into plaintiff's 1959 arrest and acquittal for extortion. However, plaintiff's doctors testified that a shock to plaintiff's nervous system could have caused the injuries for which he brought these actions. By the evidence of the 1959 arrest and acquittal defendant sought to show that a shock in the

nature of an arrest and trial for extortion is likewise capable of causing the same symptoms.

Plaintiff finally maintains that it was error for defense counsel to allude to plaintiff's army medical records and a pre-existing back injury, as these matters were not admissible in evidence. Defendants should have been allowed to put the army records into evidence. Plaintiff initially opened the area of his military medical history by his own testimony and by the testimony of his doctors concerning wounds and a neurosis suffered in the second World War. Defendant had a right to the records if there were any matters contained therein which would cast light upon plaintiff's physical condition at the time of the occurrences or at the time of trial. The references by defense counsel to the records and the pre-existing back injury did not prejudice plaintiff. We are of the opinion that the trial was substantially free of error which could have operated to the prejudice of the plaintiff and further that there was sufficient evidence upon which the jury could reasonably have found for defendants and against plaintiff. See American National Bank & Trust Co. v. Peoples Gas Light and Coke Co., 42 Ill. App.2d 163.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

LYONS, P.J., and BRYANT, J., concur.

A

51634

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM RUCKER, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In a nonjury trial the defendant was convicted of attempt (burglary)[1] and sentenced to the penitentiary for a term of two to eight years. His sole contention on appeal is that he was not proved guilty beyond a reasonable doubt. The facts follow.

Eugene Brown, the principal witness for the state, testified that at about 2:15 a.m. on March 2, 1966, he saw the defendant attempting to burglarize the "Johnny Dollar Pawn Shop," located at Millard Avenue and Roosevelt Road in Chicago; that he was with his "partner" Frog and that the two of them sat on the fender of a car parked in front of the pawnshop and watched as defendant used a crowbar and attempted to pry apart certain protective bars set in front of the window. Brown further testified that defendant broke a pane of glass and attempted to pull out a radio through the bars; that at that point he and Frog went to the corner and called the police; that they returned to the pawnshop to find a policeman at the scene; that he (Brown) told the police officer that the defendant, who was running across

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1. Ill. Rev. Stat., ch. 38, §8-4 (1965) Attempt.] (a) "Elements of the offense. A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."

the street, was the man who had attempted to burglarize the store and that the police officer arrested the defendant. Defendant was released that night and subsequently again taken into custody.

On cross-examination Brown testified that Frog's real name was Tony but that he did not know his last name; that he did not know Frog's current whereabouts, although he knew that Frog had entered the army sometime before the trial. He said that during the course of the alleged offense, he and Frog sat on top of the automobile and laughed at defendant; that this continued for about 15 minutes; that they decided to call the police and after returning to the pawnshop, found that the police had arrived.

At this point in the questioning Brown apparently became confused and contradicted much of the testimony he had given on direct examination. Defendant's attorney asked him if he recalled identifying the defendant at the scene of the crime, as he had related on direct examination, to which Brown answered as follows:

> "I cut out, I wasn't going to get involved here, to tell that boy trick on me."

He explained that he meant by that that he did not want to get involved with the police and his friend Frog had "tricked" him by obtaining the entire reward of ten dollars offered by the owner of the pawnshop to any one giving information with respect to the attempted burglary. Defense counsel again asked Brown if he spoke to the police on the night of the alleged offense, to which Brown responded:

> "A. I didn't talk to them. I told you I left.
>
> Q. Well, did you see what was happening?
>
> A. I did my deed so I went on home.

Q. I thought you said you saw—

A. Yes, I seen him when he got grabbed, told the police that is the one but the police didn't hear me but he grabbed the man anyway.

Q. So at this particular time you did not talk to the police, is that right?

....

A. No."

He was then cross-examined with respect to his prior testimony before the grand jury, and the following colloquy took place:

"Q. Do you remember saying this: 'So we went and called the police and we came back and watched. He was pulling the bars back, trying to get the radio.'

A. Yes sir.

Q. After you called the police you went back and watched him again?

A. No, no, we had called the police already.

Q. You called the police already?

A. Yes.

....

Q. You called the police twice?

A. Yes, sir."

Brown stated that he had first called the police from a grocery store; that he had returned to the pawnshop to watch the defendant; that he went to a drugstore to call the police a second time; that the police arrived and that he and Frog stayed away from the pawnshop because they did not want to get involved.

Brown then contradicted his testimony again, stating that he had watched the defendant attempt to burglarize the shop and had then called the police <u>for the first time</u>; that he did not return to the scene of the crime, but waited across the street; that he called the police a second time and saw the police arrest

the defendant. He testified that he was never brought in by the police to identify the defendant.

Henderson Arnold of the Chicago Police Department testified that he and his partner were patroling the area in question at about 2:30 a.m. on March 2, 1966, when they saw the defendant running across the street away from the Silver Dollar Pawners, Inc. He further testified that he pulled his squad car alongside the defendant and asked him why he was running; that defendant said he did not want to get involved with the police; that defendant's hand was bleeding; and that he could find no witnesses to any incident which would warrant detaining defendant.

On cross-examination, Arnold testified that he released the defendant after questioning him in the squad car and that he did not see or speak with Eugene Brown at the time of the arrest.

It is our conclusion that the judgment of conviction must be reversed. The testimony of Brown on direct examination was sufficient to sustain a finding of guilty, but on cross-examination he was so thoroughly discredited as to render his testimony of little value in determining the guilt or innocence of the defendant. We have set forth these discrepancies in detail. Much of his testimony is also incomprehensible. It is inadequate to prove the defendant guilty beyond a reasonable doubt.

Judgment reversed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

A

51160

CITY OF CHICAGO, a Municipal Corporation, Plaintiff-Appellee, v. NICOLAS FRANKO, Defendant-Appellant, and RUSSELL WALLACE, Defendant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order finding the defendant, Nicolas Franko, guilty of violation of the building code of the City of Chicago for failure to deconvert to single family dwelling, to make stairways fire resistant, and increase exits. The defendant Franko was fined $250.00.

The defendant, Russell Wallace, was also found guilty but did not appeal.

The defendant contends (1) that where the evidence does not support the charges the defendant should be dismissed, and that the enforcement of the building code for failure to deconvert to single family dwelling, to make stairways fire resistant, and increase exits cannot be accomplished by quasi-criminal action against a contract purchaser who does not hold legal title; (2) that the contract purchaser is not the owner within the purview of the applicable ordinance, nor does he have sufficient control over the property to make structural changes where the contract prohibits his allowing mechanics liens to attach, and prohibitshim from engaging contractors without approval of the contract seller, and (3) that where there is fair room for doubt in a penal action, the defendant

should be favored.

The facts are these:

The violations of the building code of the City of Chicago were not questioned by the defendants, either at the trial or here. The defendant Franko entered into a contract to purchase the premises located at 434 St. James Place, Chicago, Illinois, on June 12, 1963. The title holder was the Cosmopolitan National Bank of Chicago as Trustee under a Trust Agreement dated September 27, 1961. Russell Wallace, the other defendant in this case, was the holder of the certificate of beneficial interest in the trust. The contract for the purchase of the premises was admitted in evidence. Paragraph 4 of the Articles of Agreement for Trustee's Deed provides as follows:

> "4. Each and every contract for repairs or improvements on the premises aforesaid, or any part thereof, shall contain an express, full and complete waiver and release of any and all lien or claim of lien against the property herein agreed to be conveyed, and no contract or agreement, oral or written shall be executed by the Purchaser for repairs or improvements upon the property aforesaid, except if the same contain such express waiver or release of lien upon the part of the party contracting, and a copy of each and every such contract shall be promptly delivered to the beneficiaries of the Title Holder."

Section 39-2 of the Municipal Code of Chicago provides that:

> "...the owner...and any other person managing or controlling a building...shall be liable for any violation therein.... Wherever used in said provisions of this code, the 'owner' shall include any person entitled under any agreement to the control or direction of the management or disposition of the building ...."

As to the defendant's first contention, the installment contract was offered in evidence showing the defendant Franko to be the purchaser. The contract also made the contract

purchaser responsible for making repairs, in conforming the subject premises to the building code and he was served with process at the premises involved. We think the evidence was sufficient to show that the defendant Franko did on or about July 31, 1964, maintain, operate, collect rents for, or control the building, as alleged in the complaint.

The defendant then argues under his first point that he cannot be found guilty in this quasi-criminal action because he does not hold title.

In City of Chicago v. 934 Willow Building Corporation, 36 Ill. App. 2d 72, 183 N.E.2d 572, the court held that a contract purchaser is liable for violations of the building code by virtue of section 39-2 Chicago Municipal Code (1959) herein set forth in part.

We believe that while the evidence in this case was meager, it was sufficient to show that defendant Franko had possession and control of the premises at the time of the filing of the complaint.

Defendant's next contention is that since the contract purchaser does not hold title, and is prohibited by the contract from allowing mechanics liens to attach to the property which may be superior to the rights of the title holder, his conviction was error. In support of that contention the defendant cites City of Chicago v. Mandoline, 26 Ill. App. 2d 480, 168 N.E.2d 784, which was a prosecution under the Municipal Code of Chicago against the vendor under articles of agreement for warranty deed. Since that prosecution was against the title holder and not against the contract purchaser that portion of

the opinion relating to liability of the purchaser is obiter dictum. The contract purchaser's liability was not in issue. In the instant case the contract expressly authorizes the contract purchaser to make repairs. Section 16 of the contract provides that the purchaser covenants and agrees to keep the premises in good repair in accordance with the statutes and ordinances, and the directions of duly authorized public officers, at his own expense, and further provides that the purchaser shall make all necessary repairs to the roof and exterior walls and to the interior of the premises at his own expense, and upon purchaser's failure to make necessary repairs the beneficiaries of the title holder may, at their option, declare the agreement forfeited. The contract also provides in paragraph 20 the following:

> "20. The Purchaser shall comply with all federal, state and municipal laws, ordinances and regulations relating to the operation of the property and will not permit said property to be used for any indecent or immoral purposes. The Purchaser shall not permit waste to be committed or suffered on said premises."

[1] The defendant contends that the contract prevents him from making substantial structural changes. The contract, however, merely provides, as is set forth in paragraph 4 of the contract, supra, that the purchaser may not create any liens superior to that of the seller, and that every contract for repairs or improvements on the premises shall contain an express, full and complete waiver and release of any and all lien or claim for lien against the property, and that any such contract shall contain an express waiver or release of lien on the part of the party contracting. The purchaser under this contract realized

when he entered into the contract that for any repair work done on the building in question he would be required to secure releases from the repair men in advance as a further protection to the owner. He is in no position to state at this time that because of the language of the contract of purchase he may with impunity violate the building ordinances of the City of Chicago.

The defendant next argues that where there is fair room for doubt in a penal action, the defendant should be favored. As we see it, there is no room for doubt as to whether the act or thing complained of comes within the scope of condemnation of the penal ordinance.

For the foregoing reasons the judgment of the trial court is affirmed.

Affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

A

51564

RALPH DeMILIO, Plaintiff-Appellee, v. GLADYS D. SCHNOOR, Administrator of the Estate of Harold Schnoor, Deceased, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY MUNICIPAL DISTRICT 1

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This action was brought to recover damages for personal injuries allegedly occasioned by the defendant in the negligent operation of his automobile. Upon stipulation of the attorneys for the respective parties the issues of liability and of damages were severed for trial. The jury returned a verdict for the plaintiff on both issues and assessed damages in the amount of $11,000 upon which judgment was entered. Defendant's appeal is based solely upon the issue of damages.

Defendant maintains that error was committed by plaintiff's counsel through his persistent references, through questions and in closing argument, to certain matters after the court had advised counsel that such matters were not admissible in evidence; that the jury was improperly instructed on the question of future pain and suffering for the reason that plaintiff failed to adduce any evidence in that regard; that a prospective witness was improperly excluded from testifying concerning the time spent by plaintiff in his employment after the accident; and that the cumulative effect of the foregoing alleged errors was an excessive verdict. It is unnecessary to deal with the specific allegations of error raised by defendant since plaintiff's evidence as to damages, while showing the existence of some damages, fails to support the jury's verdict of $11,000.

Plaintiff was involved in an automobile accident with Harold Schnoor on February 6, 1955, wherein the Schnoor automobile struck the DeMilio automobile from the rear. Plaintiff was thereafter

examined and treated by his family physician and by an orthopedic surgeon, and also received extensive treatment from a physical therapist. Harold Schnoor died on December 7, 1964, and the administrator of his estate was substituted to defend this action.

Doctor Morgan Meyer, plaintiff's family physician since 1955, testified he treated plaintiff on four occasions between 1955 and February 19, 1959. The doctor testified that he examined plaintiff on February 19, 1959; plaintiff gave a history of being involved in an automobile accident on February 6th and he complained of pains and stiffness in his back and neck. The doctor testified he diagnosed muscle spasm in the lower back for which he prescribed mild pain relief medication. He further stated that it was possible that the plaintiff's condition was caused by the accident of February 6th.

Doctor Richard Cronin, an orthopedic surgeon, testified he first examined plaintiff in April of 1959 and diagnosed muscle spasm in plaintiff's back and neck. The doctor found plaintiff to be in no acute distress. He noted plaintiff had a slightly limited motion in the neck but that the rotation in the neck was essentially normal. The doctor further testified that there was a narrowing of the disc space between the C5 and C6 vertebrae which possibly could have been the result of the accident but could also have resulted from something else and that plaintiff had cervical and lumbosacral sprain which was caused by the accident. He stated that the lordotic curve was normal which indicated a less severe muscle spasm. Doctor Cronin treated plaintiff in July of 1960 and found no muscle spasm in the back or neck and found a full range of motion in the back and neck. He testified plaintiff did not complain of much pain and he thereafter diagnosed only occasional muscle spasm.

Esther Zerface, a physical therapist, testified she treated plaintiff on numerous occasions beginning in early 1960 until October of 1965, and that plaintiff was in very much pain.

Plaintiff testified in his own behalf and was limited to facts occurring after the death of defendant. He stated he was unable to work as well after the accident as he had been prior thereto. His wife testified that plaintiff "went right back to work" after the accident and had worked continuously thereafter; she stated that plaintiff returns from work complaining of pain, every day.

[1] Plaintiff's evidence shows he expended some $1,600 for medical attention, treatments and medication. Plaintiff was not seriously injured in the accident as indicated by the fact that he lost no time from work and by the testimony of his two treating physicians. While there is evidence that plaintiff suffered damages due to Mr. Schnoor's negligence, the evidence in the record does not support an award of damages in the sum of $11,000.

This Court has the power to grant a remittitur where the evidence shows the damages awarded by a jury are excessive. Ill. Rev. Stat. 1965, Chap. 110, Par. 92 (1) (e); Horns v. Johnson, 17 Ill. App.2d 314, 319. The judgment is affirmed in the sum of $7,000, providing plaintiff files with the Clerk of this Court a remittitur in the sum of $4,000 within 21 days; otherwise, the judgment is reversed and the cause remanded for a new trial on the issue of damages.

JUDGMENT AFFIRMED ON FILING OF A REMITTITUR; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

LYONS, P.J., and BRYANT, J., concur.

A

51496

SAMUEL L. OUTLAW, Plaintiff-Appellant, Cross-Appellee, v. YOUNG MEN'S CHRISTIAN ASSOCIATION, a corporation, Defendant-Appellee, Cross-Appellant, v. WINIFRED McGILL, Third-Party Defendant, Third-Party Plaintiff-Separate Appellant, Cross-Appellee, v. YOUNG MEN'S CHRISTIAN ASSOCIATION, a corporation, Defendant-Appellee, Separate-Appellee, Cross-Appellant, and LAWRENCE KENNON and WASHINGTON AND DURHAM, Third-Party Defendants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order which dismissed the above entitled action for want of prosecution. Plaintiff, Samuel L. Outlaw, and third-party plaintiff, Winifred McGill, contend that the trial court abused its discretion in refusing to vacate its dismissal order on motions timely made. Both Outlaw and McGill are proceeding pro se in this court.

On October 25, 1961, Samuel L. Outlaw, represented by Leonard Karlin, an attorney, filed his complaint against the defendant, Young Men's Christian Association, alleging false arrest and malicious prosecution. On June 8, 1962, the trial court denied a motion to dismiss the complaint.

On June 25, 1962, the YMCA filed its answer and a counterclaim against the plaintiff and named Winifred McGill as a third-party defendant. On August 31, 1962, Winifred McGill, appearing pro se, filed her answer and a counterclaim against the YMCA and named her former attorneys in another case as third-party defendants. Winifred McGill filed a jury demand, and on November 28, 1962, the case was transferred to the jury calendar.

Thereafter, numerous motions, pleadings and interrogatories were filed by all parties. A motion made by defendant YMCA for summary judgment as to the claims of plaintiff Outlaw and third-party defendant McGill was denied on January 25, 1965.

On March 30, 1966, the following order was entered by Judge Harry H. Porter:

> "This case having been assigned out for trial, and having been on the trial call for several days, and having been above the black line for three days, and the case coming on for trial, and the Court having been unable to reach counsel for Outlaw and McGill by telephone, and the Court being fully advised, it is, ORDERED that this cause is dismissed for want of prosecution."

On April 1, 1966, Judge Porter denied the motions of Winifred McGill, pro se, and Leonard Karlin, as attorney for plaintiff Outlaw, to vacate the dismissal order of March 30, 1966.

The motions to vacate were supported by affidavits. The affidavit of Winifred McGill states:

> "1. That she was present in Judge Harold G. Ward's Courtroom, number 2005, in the Civic Center, on each of the mornings, March 28, March 29, and March 30, 1966, when case number 61 S 20527 was above the black line on the Trial Call, and responded 'ready' each time the case was called.
>
> "2. That case number 61 S 20527 was number 57 on the Trial Call on March 30, 1966, and when it was called at about 10:30 A.M., it was assigned number 33, and stated to be 'about fourth up', no judges apparently being then available.

"3. That after speaking to Attorney Leonard Karlin, counsel for plaintiff, who was also present, and had responded 'ready', and who expressed the idea that the case would be assigned for the afternoon, she left to await further notification.

"4. Around lunch time, not having received any word, she called Judge Ward's office to inquire, and was informed by his secretary that the case had been dismissed that morning for want of prosecution by Judge Harry H. Porter to whom it had been assigned.

"5. That a subsequent inquiry to Judge Ward's office revealed that through an error in their records they had attempted to call her at her former address, although Winifred McGill had properly filed and served notice on all parties of her change of address and new telephone number on March 4, 1966. Furthermore she had reminded Judge Ward's office by telephone on March 28, 1966, that she had a new and different telephone number than appears on the items which she has filed in the case.

"6. That she truly believes her counterclaim to the YMCA's Amended Counterclaim, which she prepared and filed, constitutes a valid, good, justiciable and meritorious cause of action, well founded on fact and in law.

"7. That she has at all times proceeded with all due diligence in the prosecution of her counterclaim, expending large amounts of time, attention, energy and money in so doing.

"8. That the dismissal of her counterclaim for want of prosecution was due to a misunderstanding and not the result of any lack of diligence on her part."

The affidavit of Leonard Karlin states:

"3. I am the attorney for the plaintiff herein, and filed the Complaint on the basis of the law and facts, and verily believe that the complaint herein constitutes a good, valid, and justiciable and meritorious cause of action.

"4. That at all times I have proceeded with all due diligence and the exigencies of the prosecution of the said cause.

"5. That I have responded on the trial call on each of the days of this week since the case appeared 'above the black line,' and on this morning was informed that the case held No. 33, and was 'in line for assignment to a judge about the "fourth case"', the implication, at 10:30 A.M.

being that there was no judge then available, from which I inferred that the cause would be 'sent out' about noon, and that jury selection would begin in the afternoon.

"6. Upon returning to my office I received a call of an emergency matter of a criminal nature where my services were required, and I proceeded thence.

"7. Upon my return I found a recording on my message device that the file had been sent to Judge Porter.

"8. Upon my arrival at the courtroom of Judge Porter I was informed the cause had been dismissed for 'Want of Prosecution' before noon."

Subsequent motions to vacate, supported by affidavit, were filed on April 23, 1966. An affidavit in the record, filed on April 28, 1966, by Outlaw, includes the statement:

"18. Judge Porter berated Winifred McGill and myself for not being represented by attorneys. He said that 'it is very dangerous to attempt to try a case yourself, because you will probably commit reversible error, and if so you would be cited for contempt." and

"21. * * * 'IF BOTH of you show up here in two weeks with lawyers, AND IF Judge Ward consents AT THAT TIME to reassign the case I will vacate the dismissal. However he refused to enter an order to that effect, or any other kind of order either."

Initially, we wish to observe that we have examined this record with the view that when litigants undertake to exercise their constitutional rights to conduct and manage their own litigation, it necessarily follows that they must observe established court rules and practices. They are not permitted to obstruct the orderly court procedures before or during the course of a trial. See, also, Biggs v. Spader, 411 Ill. 42, 103 N.E.2d 104 (1952).

It is unnecessary to review the numerous authorities on the propriety of vacating default orders or judgments. In Dann v. Gumbiner, 29 Ill. App.2d 374, 173 N.E.2d 525 (1961), in the

consideration of a motion to vacate a default judgment, this court said (p. 379):

> "The motion or petition should show a meritorious defense and a reasonable excuse for not having made that defense in due time. * * * The object is that justice be done between the parties, and one party is not permitted to obtain and retain an unjust advantage. The result obtained from the application of these rules depends upon the facts to which they are applied. The motion is addressed to the sound legal discretion of the court, and it is only when there is an abuse of discretion that a reviewing court will interfere. * * * Courts in this state are liberal in setting aside defaults during the term time in which they are entered, when it appears justice will be promoted. * * * 'The power to set aside a default and permit a defendant to have his day in court is based upon substantial principles of right and wrong and is to be exercised for the prevention of injury and the furtherance of justice.'"

As the record does not reflect any failure of the appellants to observe the rules and routine of the trial court, we believe the supporting affidavits of Winifred McGill and Leonard Karlin (who withdrew from the action after the denial of the motion to vacate) showed diligence in following the daily trial call and a fairly reasonable misunderstanding of the pronouncements of the assignment judge, which resulted in their absence from the assignment court for a relatively short period of time. Also, we note that the court's denial of the motions to strike the complaint of plaintiff Outlaw and the counterclaim of third-party plaintiff McGill demonstrated that these pleadings sufficiently alleged causes of action.

We conclude that the affidavits and the record made a showing of reasonable diligence and a cause of action, and the trial court, in the exercise of sound discretion, should have vacated the order of dismissal and reinstated the entire cause in order

to permit a trial on the merits.

The order of dismissal is hereby reversed and the cause is remanded with directions to reinstate the cause on the trial calendar.

REVERSED AND REMANDED WITH DIRECTIONS.

BURMAN and ADESKO, JJ., concur.

Abstract only.

84 I.A.2 328
No. 66-57

IN THE

APPELLATE COURT OF ILLINOIS

Third District

A D 1967

Abstract

IN THE MATTER OF THE ESTATE OF ALICE M. SULLIVAN, DECEASED.

DOROTHY SULLIVAN, MICHAEL J. SULLIVAN, W. PATRICK SULLIVAN, and MARY FRANCES SULLIVAN,

Appellants,

vs.

JOHN C. SULLIVAN, Administrator With the Will Annexed of the Estate of Alice M. Sullivan, Deceased; MICHAEL J. SULLIVAN, individually, and under a power of attorney for MARGUERITE S. CHAPPEL, CATHERINE LOUISE SULLIVAN and MARY M. POPLETT; and GENERAL TELEPHONE COMPANY OF ILLINOIS,

Appellees.

Appeal from the Circuit Court of the County of Peoria, Illinois.

CORYN, J.

Appellants, Michael J. Sullivan, W. Patrick Sullivan, and Mary Frances Sullivan, are some of the heirs of Alice M. Sullivan, their paternal aunt, who died testate at Dunlap, Illinois, on June 7, 1963, and they also appear to be the legatees of a some fractional part of the residue of her estate. Their father predeceased testator, and their mother, Dorothy Sullivan, who has no interest in the estate, is the other appellant. They complain here of an order of the Circuit Court, in probate, by which the Adminis-

trator C/T/A was authorized to sell certain assets of the residuary estate consisting of 420 shares of the Suburban Telephone Company to the appellee, General Telephone Company of Illinois, for the sum of $426,300.00. Their principal contentions are that the proceeding at which this sale was authorized was irregular because, (a) they and their attorneys had no notice of any proceedings to approve such a private sale; and (b) the order, in fact, grants relief at variance with that requested by the prayer of the administrator's petition; and (c) the sale price is inadequate. Thus it is argued that where the price is shown to have been inadequate, and the proceedings are shown to have been accompanied by irregularities, the trial court should have disapproved the sale, and that its failure to do so is violative of constitutional guaranties that appellants shall not be deprived of their property without due process. Appellants ask that the sale be set aside.

Appellees have filed a motion to dismiss this appeal because of serious deficiencies in appellants' brief and the latter's failure, in other important details, to comply with Illinois Supreme Court Rules regarding appeals. We have given appellees leave to file a supplemental record on appeal, and an additional abstract, which are before the court. Thus, considering that the appellant, Mary Frances Sullivan, was a minor at the time the trial court proceedings were concluded, and that no prejudice will result to appellees from our doing so, we have elected to deny the motion, and to carefully review the record itself, as well as the supplemental record. We find, however, that on account of appellants' failure to incorporate important matters into the record on appeal, and to abstract the same, and because of their failure to give appellees notice of their praecipe for record, it was necessary for appellees to apply here for

leave to file, and thereafter to file the supplemental record, and also an additional abstract. We further find that Dorothy Sullivan is not a proper party to this appeal, and her appeal is accordingly dismissed.

The record and supplemental record disclose the following course of events. On September 24, 1965, appellants, including Dorothy Sullivan, filed a petition offering to purchase the 420 shares for the "reasonable price" of $41,745.40 (i.e., $99.37 per share). They represented therein that they had this stock appraised, that their offer was fair, that it would be to the best interests of the estate that it be accepted, and they prayed that the administrator be ordered to accept their offer. This petition was typed on stationery bearing a printed legend in the left margin, "Kehr and Covey, Attorneys at Law" with an address, but nowhere recites that said attorneys were appearing for the petitioners therein, each of whom signed his or her own name. The hearing on this petition was continued to November 10, 1965, and was then denied when the appellee, Michael J. Sullivan (a cousin of appellants), informed the trial court that he had been negotiating for the sale of the same shares to General Telephone Company, and had received an offer of $675 for each of the 420 shares. On February 1, 1966, the administrator filed his petition herein representing that in addition to the substantial offer of General, an offer from Continental Telephone Corporation at $710 per share had been received. In this petition the administrator asked that the higher offer of Continental be accepted; that he be authorized to consummate the sale privately; that a hearing be held in the matter; that a guardian ad litem be appointed to represent the minor heir, Mary Frances Sullivan; and that the clerk of the court be directed to give notice to all interested parties, or their attorneys, of the time and place

of the hearing. The court thereupon appointed Jay H. Janssen, an attorney, as guardian ad litem for Mary Frances Sullivan; fixed February 21, 1966, at 10:00 a. m. as the hour of the hearing; and ordered the clerk to give notice of the petition and hearing date to all interested heirs and legatees, their names and addresses being set out in the order. On February 3, 1966, the clerk filed his certificate showing that a copy of the petition and notice of hearing date thereon was mailed to all heirs and legatees, including those who are appellants. Those for Mary Frances Sullivan are shown mailed to her in care of her mother, Dorothy Sullivan. On February 14, 1966, appellee, Michael J. Sullivan filed an answer to the administrator's petition stating that his attorney had contacted General again, and was advised that it would submit a higher bid than Continental's offer of $710 per share. The answer then prayed that a private sale should be authorized, for cash, but that both Continental and General should be allowed to bid; that the bidding should be conducted on the hearing date set for the administrator's petition; and that a sale be consummated then. A certificate of said appellee's attorney is filed under date of February 14, 1966, showing that a copy of this answer with its prayer for alternative relief was mailed to all heirs and legatees, including those who are appellants. On February 21, 1966, all the appellants appeared by the same attorney who represents them here, and the guardian ad litem for Mary Frances Sullivan also filed an answer on her behalf. At the conclusion of this hearing, the appellant's attorney objected to the sale on the ground that Illinois Bell Telephone Company was also interested but had not been notified and had no representative present. The administrator had testified, however, without contradiction, that he had talked with representatives of Illinois Bell Telephone Company and of

Middle States Telephone Company, and ascertained that they were not interested. The court thereupon overruled the objections, submitted the shares to the bid of General and Continental, and thereafter approved the bid of General for $1,015.00 per share for the 420 shares. On March 23, 1966, appellants filed a post-trial motion to set aside the order approving the sale, appending in support thereof and as grounds therefor a certain complaint filed March 18, 1966, by appellants in another cause, No. 66 E 979, in the Circuit Court of Peoria County, against the administrator and decedent's three surviving sisters, who are also legatees. This complaint alleges that the 420 shares aforesaid were, at the time of his death, the property of John C. Sullivan, the husband and father of appellants, and that they were thereupon wrongfully transferred on the books of the corporation by testator and her three sisters to testator. It prays damages in the sum of $343,600 as well as an injunction restraining the transfer of said 420 shares, a decree that their issuance to testator is void, and for a declaration of a constructive trust. The post-trial motion was denied, and this appeal followed.

Appellants' complaint that they had no notice of the proceedings for a private sale of the securities by the administrator, and their contention that the order authorizing the sale is at variance with the prayer of any petition for relief pending before the court are shown by the foregoing matters of record to be unfounded and factually incorrect. The order of the court, of which they complain, allows the relief prayed by the answer of appellee, Michael J. Sullivan. The supplemental record shows that appellants were given notice of this answer with its prayer for alternative relief. If appellants neglected to advise their attorney until the morning of the hearing as to the existence of the answer which they had received,

as appears from their brief to be the case, such neglect of their own is not a valid basis for the conclusion that they are deprived of due process by appellees or by rulings of the court. The guardian ad litem makes no claim that he did not receive notice, and it is also clear that no other attorney had previously made an appearance for any of the appellants. A misapprehension on the part of appellants regarding the import of notices they personally received, might have been grounds for a continuance if, in the judgment of the trial court, it would not seriously inconvenience other parties, or jeopardize the estate in any way. Appellants, however, did not ask for a continuance, but appeared at the hearing by the attorney who represents them in this appeal, mentioned nothing to the trial court about inadequate notice, participated in the hearing, cross-examined the witnesses, and then objected to the sales on the ground that the administrator had not exhausted all sale possibilities. The administrator had testified, however, that he had ascertained that Illinois Bell Telephone Company was not interested, and that he had unsuccessfully solicited offers from Middle States Telephone Company as well. On the basis of this uncontradicted testimony, and after ascertaining that no representative of Illinois Bell Telephone Company was present, the objections were overruled. We find no error in this respect.

It is argued that the price of $426,300.00 bid by appellee, General Telephone Company, and approved by the court is inadequate. There is no evidence in the record to support that assertion and none was presented to the trial court. Appellants attempt to support this assertion by attaching to their brief as an "Addendum to Facts" an extract from the deposition of the Administrator allegedly taken June 24, 1966, in Cause No. 66 E 979.

Obviously, that deposition was taken subsequent to the proceeding and order in this cause, and subsequent to the post-trial motion on March 23, 1966, and was never considered by the trial court, either before or after its ruling approving the sale. It comprises no part of the record in this cause and cannot be considered here. Being a court of appeal, our considerations are limited to a review of the record, to ascertain whether the trial court, in view of matters brought to its attention, ruled correctly. In the absence of anything in the record to substantiate the assertion that the price is inadequate, the contention, especially in view of the appellant's own petition of September, 1965, wherein they sought to purchase the same shares for $41,745.40, appears frivolous.

Appellants also argue that the trial court erred in overruling their post-trial motion in view of the existence of the issue set forth in their complaint in Cause 66 E 979, which complaint was appended in support of the motion. We disagree. In the absence of any showing that the proceedings in Cause 66 E 979 had been disposed of favorably to appellants, or that an injunction had issued, the matters therein alleged were never before the court in the proceedings on the administrator's petition.

We conclude that the sale of said stock conforms to the provisions of ch. 3, §§ 209, 210, and 211, Ill. Rev. Stat., and therefore the order of sale of the trial court is affirmed. It is further ordered and adjudged by this court that the costs of this appeal be taxed in favor of appellees and against the appellants.

Affirmed.

Stouder, P. J. and Alloy, J. concur.

51206

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT OF COOK COUNTY,
v.	)	
	)	CRIMINAL DIVISION.
BARBARA BLAKELY, Appellant.	)	

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

After a bench trial the defendant, Barbara Blakely, was convicted of armed robbery and sentenced to the Reformatory for Women at Dwight, Illinois, for not less than one nor more than three years.

Contention on Appeal

Defendant's sole contention is that she was not proven guilty beyond a reasonable doubt.

Evidence

Testimony of State Witnesses

According to the evidence adduced by the prosecution, defendant robbed a cab driver, David Maggette, at gunpoint of $14. Defendant entered the cab in the 4600 block of South Lake Park Avenue in Chicago, Illinois; she asked to sit in the front seat because her leg was injured, and requested that Maggette drive her to Michael Reese Hospital; while en route, defendant drew a gun and demanded Maggette's money, and he gave her $14; she also took his wallet, which was empty; defendant then ordered Maggette to drive around and said that she intended to kill him; while at a stoplight at 43rd and Drexel defendant shifted the gun to another hand, thus pointing it away from defendant, in order to light a cigarette; Maggette grabbed the gun, threw it into the back seat. Maggette further testified that a scuffle ensued and he pulled defendant from the cab; that at that time a squad car approached and defendant ran from the police into an alley; that the proceeds of the robbery, with the exception of $2.00, were scattered about the cab; and that the police apprehended defendant and found his wallet on the street next to her. She had $2.00 in her possession.

One of the arresting officers, T. A. Harris, corroborated the cab driver's testimony that defendant fled the scene as the squad car arrived. The officer stated that defendant was apprehended and had $2.00 in her possession. He further testified that immediately following the apprehension of defendant, Maggette said that she had robbed him. Maggette was holding the gun which he allegedly took from defendant.

The other arresting officer, S. Barkauskas, testified that defendant admitted that the gun belonged to her; and that she denied committing the robbery.

Testimony of Defendant

Defendant testified at trial and denied committing the robbery. She admitted entering the cab, but stated that she sat in the back seat and that Maggette offered her $3.00 to have sexual intercourse with him. She declined his offer and stated that she only wanted a drink. Maggette offered to drink with her and requested that she sit in the front seat of the cab, which she did. Maggette then handed defendant a dollar, which she kept in her hand along with a dollar of her own, and she intended to use it to purchase a bottle of liquor. Defendant further testified that when the cab stopped in front of a liquor store at 43rd Street and Drexel she adjusted her sweater and Maggette saw the handle of her gun protruding from the top of her slacks; he grabbed the gun and defendant, frightened by the course of events, jumped out of the cab and began running but was stopped by the police.

Opinion

In contending that she was not proven guilty beyond a reasonable doubt, defendant argues that "a careful examination of the evidence fails to disclose any reason why the story of the complaining witness

should be believed instead of the story of the defendant." In support thereof defendant relies upon alleged contradictions in the evidence of the prosecution: first, that it is unbelievable that defendant would drop $12 and retain $2.00 of the alleged robbery proceeds; second, the fact that defendant switched gun hands shows that the money was not held in her hand, and thus she couldn't have dropped the money during a struggle; third, the complaining witness testified that the gun was thrown in the rear seat of the cab and did not see it again until at the police station a short time later, whereas Officer Harris testified that when he arrived at the scene the complaining witness was holding the gun; and, fourth, Maggette testified that the police recovered his wallet from the ground near the defendant, but this was denied by Officer Harris.

In a bench trial it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony. People v. Clark, 30 Ill. 2d 216. The effect of minor variations in testimony or lack of recollection by the witness upon the credibility of that witness is a matter for the trial court's determination. People v. Robinson, 30 Ill. 2d 437. In the instant case, the trial judge as trier of fact believed the pertinent testimony of the complaining witness. That testimony is sufficient to prove the defendant guilty beyond a reasonable doubt.

Holding on Appeal

We find that the defendant was proven guilty beyond a reasonable doubt. Therefore the judgment of the trial court is affirmed.

AFFIRMED

English, P.J., and McCormick, J., concur.

Publish Abstract Only.

50995

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY,
	)	
JAMES P. CHIPMAN,	)	MUNICIPAL DIVISION.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant was arrested on February 18, 1965, and charged with driving a motor vehicle while under the influence of intoxicating liquor. Defendant was subsequently found guilty and fined $100.00. From that judgment defendant appeals.

Defendant contends the complaint filed against him was void and invalid in that it failed to charge him with the offense of which he was later found guilty.

In his brief the defendant sets forth a copy of a complaint and notice to appear, allegedly issued against the defendant, in which the defendant appeared to have been charged with driving and operating a motor vehicle on a public street in the city of Chicago and unlawfully violating section 47 U.A.R.T. of the State of Illinois by "driving under influence." The words "driving under influence" werewritten in longhand on the copy of the complaint which appears in defendant's brief.

Section 47 U.A.R.T. (Ill. Rev. Stat. 1963, chap. 95-1/2, par. 144), provides in part as follows:

> "... (a) It is unlawful and punishable as provided in subdivision (c) of this section for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle within this State."

The gist of defendant's argument is that the words

"driving under influence" on the copy of the complaint appearing in defendant's brief are not sufficient to apprise the defendant of the offense with which he was charged. It is, however, unnecessary for us to decide this point for the reason that the copy of the complaint which defendant has inserted in his brief is not a part of the record before this court. The complaint which has been certified to us and appears in the record shows that the defendant was charged with driving a motor vehicle while under the influence of intoxicating liquor. The defendant does not urge that the complaint, which is a part of the record before us, is in any way insufficient.

The defendant also contends that the complaint set out in his brief is the copy which he received from the police officer. However, there is no report of proceedings before us to support this contention. The form of complaint set out in defendant's brief differs in form from the complaint in the record on appeal, as well as in the description of the charge. On review this court can only hear and determine the case on the record before it. Iczek v. Iczek, 42 Ill. App. 2d 241, 191 N.E.2d 648; 2 I.L.P. Appeal and Error, sec. 511, and cases therein cited.

We therefore conclude that since the defendant does not question the legal sufficiency of the complaint which is a part of the record before us, and attacks only a document or "copy of complaint" which is not a part of the record and therefore not before us, the judgment must be affirmed.

Judgment affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract only.

51524

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
v.) Appeal from the Circuit Court
JEROME MARTIN PLACE,) of Cook County, Criminal Division.
Defendant-Appellant.)

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

In a non-jury trial the defendant was found guilty of contributing to the sexual delinquency of a child (Ill.Rev.Stat., 1965, chap. 38, para. 11-5(a)(3)) and was fined $200.00. Several reasons are urged for reversal of the conviction, but it is unnecessary to mention all of them because of our conclusion that the defendant was not proved guilty beyond a reasonable doubt.

The defendant, a high school teacher, was convicted on the testimony of a 16-year-old girl who was a student in the school where the defendant taught. The defendant was a friend of the girl's family and lived in an apartment in a four-apartment building owned by the girl's grandparents. He had resided in the building for over ten years and had been a dinner guest of the grandparents on several occasions.

The girl was frequently absent from school and wrote notes to the school authorities, to which she forged her mother's signature, explaining her non-attendance. On January 3, 1966, she telephoned her school principal that she would no longer be in school because she had married. He said that the withdrawal would have to be in writing. On January 5th he received a letter, purportedly written and signed by her

mother, which said that her daughter was dropping out of school because she was married and was moving to California. On January 6th the principal notified all teachers to drop her from their classes.

The defendant met the girl's younger brother and told him that his sister had quit school. The boy repeated this to his sister. Fearful that the defendant might tell other members of the family, she went to see him. She knocked on the door of his apartment a little after 6:00 p.m. on January 10th; he opened the door and she walked in. She told him that she hadn't quit school; that the letter which said she was dropping out of school had been written by a girl who was trying to get her into trouble.

The defendant testified that thereafter they talked for a few minutes about members of her family and about some of the things she observed in his apartment. He testified that they said good-by to each other at the door, which had been left open during her brief visit. He further testified that other residents of the building were in their apartments at the time and that voices in one apartment could be heard in another. After the girl departed he finished his dinner, left to keep a tutoring engagement and arrived at the student's home at 6:20 p.m.

The girl testified that after she talked to the defendant about school he pushed her down on a couch but that she got up and went to the door. According to her, he got close to her, held her against the door, put his hands on her back under her blouse and unhooked her bra. She said she told him to leave her alone, but he kept saying that she was pretty and that he wished she were his daughter; that he put his hands

close to her breasts, lowered himself and looked at them underneath her blouse. She asked him to let her go home and he opened the door and she ran out. She testified that her blouse was old and tight and that a button or two came off while he had his hands under it. The blouse was produced at the trial.

The father of the student whom the defendant tutored testified that the defendant arrived at their home at 6:20 p.m. on January 10th and taught his son for more than two hours. The school principal testified about the girl's absences from school and the subsequent conversations he had with her and her mother about the notes and letters he received. He had known the defendant for ten years and he testified that the defendant's reputation for morality was very good. The superintendent of the high school, who had also known the defendant for many years, confirmed his good reputation.

It has been repeatedly held in indecent liberties cases that because an accusation of sexual misconduct is easily made and difficult to defend, the testimony of the prosecutrix must be either substantially corroborated or clear and convincing. People v. Kolden, 25 Ill.2d 327, 185 N.E.2d 170 (1962); People v. Parker, 15 Ill.2d 508, 155 N.E.2d 588 (1959); People v. Cerino, 24 Ill.App.2d 75, 163 N.E.2d 846 (1959).

A blouse with a couple of buttons missing, and which had been in the prosecutrix' possession a week before it was turned over to the police, is not the substantial corroboration required under the facts of this case. The conviction of the defendant depended upon the testimony of the prosecutrix and her testimony, while clear, was far from convincing. She left the defendant's apartment without talking to her grandparents and did not tell her mother her version of what took place until four days later,

and then only when her deceptions and fabrications had caught up to her. Her failure to make an immediate complaint casts doubt on her story and her propensity for lying makes it suspect. She repeatedly lied to her family and to school officials. She admittedly lied to the defendant when she told him she was still going to school and when she said another girl had written the letter which said that she was discontinuing school. She wrote that letter herself and signed it with her mother's name. She lied in the letter about being married and about going to California. On the other hand, the defendant was a man of good reputation and the school officials thought enough of him to assign him as chaperon of the students on numerous trips taken by them. The testimony in regard to his excellent reputation was unchallenged. He denied the offense when the police confronted him with the girl's story and he persisted in his denials at all times.

Although the credibility of the witnesses and the weight to be given their testimony and the inferences to be drawn therefrom are primarily for the determination of the trial court, a reviewing court, which is especially charged with the duty of carefully examining the evidence in indecent liberties cases (People v. Nunes, 30 Ill.2d 143, 195 N.E.2d 706 (1964)), will not hesitate to set aside the judgment if it finds the evidence insufficient to remove all reasonable doubt of the defendant's guilt.

The State's evidence does not remove all reasonable doubt of the defendant's guilt and the judgment will be reversed.

Judgment reversed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.